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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 205.

ANDREW H. HAMMOND AND ARTHUR A. GOODELL, APPELLANTS,

vs.

THE MASON AND HAMLIN ORGAN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED 11TH JULY, 1874.

Affirmed
Jas Miller
for Waite

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UNITED STATES OF AMERICA,
Massachusetts District:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three, before the honorable George F. Shepley, circuit judge.

ANDREW H. HAMMOND ET AL., COMPLAINANTS,
vs.
THE MASON AND HAMLIN ORGAN COMPANY, defendants. } In equity.

2 The bill of complaint in this cause was filed in the clerk's office on the first day of January, A. D. 1873, and was duly entered at the October term of this *of this* court, A. D. 1872, and is in the words and figures following, namely:

3 *Bill of complaint.*

To the judges of the circuit court of the United States for the district of Massachusetts, in the first judicial circuit:

Andrew H. Hammond and Arthur A. Goodell, citizens of the United States, of America, residing in the city of Worcester, in said district, and State of Massachusetts, bring this their bill against the Mason and Hamlin Organ Company, a corporation duly organized and created according to the laws of the State of Massachusetts, and doing business and having its principal place of business at the city of Boston, in said district, and State of Massachusetts.

And thereupon your orators complain and say that prior to the 18th day of November, 1856, La Fayette Louis, of the city of Boston,
4 and State of Massachusetts, was a citizen of the United States, and was the true, original, and first inventor or discoverer of a new and useful invention, to wit, an improvement in melodeons or reed instruments, consisting of the application of mechanism to produce a "tremolo" in the musical note on said instruments, and that said invention and improvement was not known or used by others before the invention and discovery thereof by the said La Fayette Louis.

That the said La Fayette Louis thereupon, afterwards, did apply to the Commissioner of Patents of the United States for letters-patent for such invention, and having fully and in all respects complied with all the requirements of the law in that behalf, and especially having made oath that he verily believed himself to be the true inventor or discoverer of said improvement, and also having paid into the Treasury of the United States the sum of thirty dollars, and presented to the Commissioner of Patents of the United States a petition setting forth his desire to obtain an exclusive property in said invention, and praying that letters-patent might for that purpose be granted unto him, and having also delivered and filed in said office of the Commissioner of Patents a written description of his said improvement in such full, clear, and exact terms as to enable any person skilled in the art to which said invention was most nearly allied, to wit, the art of making reed instruments and the art of playing upon the same *to make*
5 *and use the same;* which said description was duly signed

by the said La Fayette Louis and attested by two witnesses; thereupon the said Commissioner of Patents caused letters-patent to be made out in the name of the United States of America, in due form of law in all respects, bearing date the 18th day of November, one thousand eight hundred and fifty-six, whereby was granted unto the said La Fayette Louis, his heirs, administrators, or assigns, for the term of fourteen years from the date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention, which is entitled in said letters-patent an improvement in melodeons; and the said letters-patent having been signed by Robert McClelland, Secretary of the Interior of the United States, and countersigned and sealed with the seal of the Patent-Office of the United States, by C. Mason, Commissioner of Patents of the United States, and the same having been duly recorded, were issued under the number 16094 unto the said La Fayette Louis, and by virtue of the premises the said La Fayette Louis became and was the sole and lawful owner of all the rights and privileges granted and secured, or intended to be secured, in and by said letters-patent, as by reference to said letters-patent, or a certified copy thereof here in court to be produced, will more fully and at large appear.

And your orators further show to your honors that heretofore and after said 18th day of November, 1856, and about the 26th day of February, 1867, the said La Fayette Louis, finding that the said letters-patent which had been granted to him were inoperative by reason of a defective and insufficient specification, and said error having arisen by inadvertence, accident, and mistake, and without any fraudulent or deceptive intention on his part, duly surrendered his said letters-patent according to law, and new letters-patent for the same invention were caused to be issued, in accordance with correct specifications, by the Commissioner of Patents to the said La Fayette Louis, on the 26th day of February, 1867, whereby was granted to the said La Fayette Louis, his heirs, administrators, and assigns, for the then unexpired term of fourteen years from the said 18th day of November, 1856, the full and
6 exclusive right of making, using, and selling the said invention and discovery and improvement in melodeons, a description whereof was given, in the words of said La Fayette Louis, in the schedule annexed to said re-issued letters-patent. That said re-issued letter'-patent were issued in the name of the United States, and were signed by the Acting Secretary of the Interior, and were countersigned by the Commissioner of Patents, and were sealed with the seal of the Patent-Office of the United States, and were numbered 2498, and were issued and delivered to said La Fayette Louis.

And your orators further show unto your honors that thereafter, and on or about the 26th day of May, 1868, the said La Fayette Louis, again finding that the said re-issued letters-patent which had been granted to him were inoperative by reason of a defective and insufficient specification, and said error having arisen by inadvertence, accident, and mistake, and without any fraudulent or deceptive intention on his part, duly surrendered his said re-issued letters-patent according to law, and new letters-patent for the same invention were caused to be issued, in accordance with corrected specifications, by the Commissioner of Patents to the said La Fayette Louis on the 26th day of May, 1868, whereby was granted to the said La Fayette Louis, his executors, administrators, and assigns, for the then unexpired term of fourteen years from the said 18th day of November, 1856, the full and exclusive right of making, using, and selling the said invention and discovery and improvement in melo-

deons, a description whereof was given in the words of said La Fayette Louis in the schedule annexed to said last-named re-issued letters-patent. That said last-named re-issued letters-patent were issued in the name of the United States, and were signed by the Secretary of the Interior, and were countersigned by the Commissioner of Patents, and were sealed with the seal of the Patent-Office of the United States, and were numbered 2944, and were issued and delivered to said La Fayette Louis.

And your orators further show unto your honors that the said La Fayette Louis, being possessed of the exclusive rights secured by the said re-issued letters-patent last named, and of the said invention, on or about the day of September, 1869, at the city of Jacksonville, in the State of Florida, deceased, leaving a will duly executed by him, and proved and admitted to probate, and duly recorded in the office of the county court of Duval County, in said State of Florida, on the 19th day of October, 1869; that on said date last named one El Dora Louis, widow of the said La Fayette Louis, was duly appointed and qualified as the administratrix cum testamento annexo of said La Fayette Louis, and virtue of said will and said letters of administration the said El Dora Louis was, on the 3d day of November, 1870, possessed of the exclusive rights secured in said invention by said letters-patent. That thereupon the said letters-patent were duly extended by the Commissioner of Patents to the said El Dora Louis, administratrix, for the term of seven years from the 18th day of November, 1870.

And your orators further show unto your honors that thereafter, and on or about the 25th day of July, 1871, the said El Dora Louis, administratrix, finding that the said letters-patent which had been re-issued to said La Fayette Louis and extended to her, the said El Dora Louis, were inoperative by reason of a defective and insufficient specification, and said error having arisen by inadvertence, accident, and mistake,
7 and without any fraudulent or deceptive intent on the part of said La Fayette Louis, patentee duly surrendered the said extended letters-patent according to law, and new letters-patent for the same invention were caused to be issued in accordance with corrected specifications by the Commissioner of Patents to the said El Dora Louis on the 25th day of July, 1871, by which was granted to the said El Dora Louis, administratrix of La Fayette Louis, deceased, her successors or assigns, for the then unexpired term of twenty-one years from the 18th day of November, 1856, the full and exclusive right of making, using, and selling the said invention and discovery and improvement in melodeons (a description whereof was given by the patentee in the schedule annexed to said re-issued letters-patent) throughout the United States. That said re-issued letters-patent were issued in the name of the United States, and were signed by the Acting Secretary of the Interior, and were countersigned by the Commissioner of Patents, and were sealed with the seal of the Patent-Office of the United States, and were numbered 4486, and were issued and delivered to the said El Dora Louis, administratrix.

And your orators further show unto your honors that thereafter, and on or about the 30th day of May, 1872, the said El Dora Louis, administratrix, being then the sole and exclusive owner of the said invention and discovery and of the exclusive rights secured by the re-issued letters-patent last named, by her deed of that date, duly executed and recorded in Liber V 15, page 369, of transfers of patents in the United States Patent-Office, for a valuable consideration, duly conveyed to the said Andrew H. Hammond and Arthur A. Goodell all her right, title, and

interest in and to the said letters-patent as last re-issued and the invention and discovery secured by the said re-issued letters-patent, in and for the United States of America, with the exclusive right to manufacture, use, and vend the said improvement in melodeons and all parts thereof during the unexpired term of said extended letters-patent, as by said deed here in court to be produced, if required, will more fully appear.

And your orators pray that said re issued letters-patent No. 4486 and the schedule annexed thereto as aforesaid may be deemed and taken as part of their bill of complaint; and to the original of which, or a duly-authenticated copy thereof, now in your orators' possession, and ready to be produced, they crave leave to refer.

And your orators further show unto your honors that, by reason of the premises, your orators, the said Andrew H. Hammond and Arthur A. Goodell, on the 30th day of May, 1872, became, and ever since the day of said assignment have been, entitled to all the rights, interests, and privileges thereby secured by said latters-patent re-issued on the 25th day of July, 1871, in and to the said invention and discovery of said improvement in melodeons, and the exclusive right to make, use, and vend the same throughout the United States and the Territories thereof.

8 And your orators further show unto your honors that the said invention or discovery so patented as aforesaid is of great utility, and that the same has been extensively introduced into public use, and that the public have generally acquiesced in your orators' exclusive right to the same; and your orators, the said Andrew H. Hammond and Arthur A. Goodell, would, but for the wrongful acts of the said defendant, and others acting in concert with the defendant, have made large gains, profits, and advantages from the manufacture, use, and sale of the said invention. And your orators, the said Andrew H. Hammond and Arthur A. Goodell, would, but for the wrongful acts of the said defendant, and others acting in concert with the defendant, now be enabled to make, use, and sell the said improvement, to which they are entitled to the exclusive right, as aforesaid, with profit and advantage, but that by the said wrongful acts and doings they are now prevented and hindered from so doing.

And your orators further show unto your honors, upon information and belief, that the defendant and the officers and agents of the defendant, well knowing the premises, and the rights and privileges secured unto your orators, and in order to deprive them of the profits, benefits, and advantages which might and otherwise would have accrued to them, at the city of Boston, and within the said district of Massachusetts, and without the licence of your orators, or either of them, the said defendant, the Mason and Hamlin Organ Company, ever since the said 30th day of May, 1872, unlawfully and wrongfully have made, used, and sold, or caused to be made, used, and sold, melodeons and reed musical instruments in which the air is drawn through the reeds by exhaust or

9 rarefaction, each and all containing the said invention, consisting as therein and in the specification of said patent set forth of—

1. A tremolo valve-fan or beater, substantially as specified in said specification, in combination with the reeds of the melodeon or instrument, in which the air is drawn through the reeds by the exhaust action of a bellows.

2. A tremolo-beater, actuated by independent mechanical devices, substantially as specified in said specification.

3. A wind-wheel, or equivalent motor, for actuating tremolo-mechanisms, substantially as specified in said specification.

4. Pulsating-mechanism, adapted, without cutting off the continuous flow of air past the pulsator, to produce in bellows-instruments the tremulous note.

And your orators further show that they now are, and ever since the said 30th day of May, 1872, have been, in the full enjoyment of the rights and interests acquired by them as aforesaid, and *and* that said rights and interests have been and are of great value to your orator', to wit, the value of fifty thousand dollars, and your orators are entitled to all the damages occasioned by the infringement of the said letters-patent, as well as to all the profits derived therefrom, by the manufacture, sale, or use of tremolo-mechanisms made in violation of said patent, and are by law entitled to sue for and receive the same to their own use.

10 And your orators further show unto your honors that they believe, and therefore charge the fact to be, that the said La Fayette Louis was the original and first inventor and discoverer of the improvement in melodeons patented as aforesaid, and described and claimed in said letters-patent as aforesaid, and that the same was not known or used by any other person or persons before the invention and discovery thereof by him, the said La Fayette Louis, the exclusive right to which is secured to your orators, the said Andrew H. Hammond and Arthur A. Goodell, as hereinbefore set forth, and which said unlawful manufacture, use, and sale by the defendant as aforesaid is a violation and infringement if your orators', the said Andrew H. Hammond and Arthur A. Goodell, exclusive rights and privileges; and that the said defendant has derived and received, and is still deriving and receiving, from such unlawful manufacture, use, and sale great gain and profits, but to what amount your orators are ignorant, and cannot set forth; but your orators pray that the defendant may be required to make a disclosure of all such gains and profits.

And your orators in like manner aver that the defendant, though requested to desist from such unlawful manufacture, use, and sale, and to pay to your orators such gains and profits as the defendant has actually made, refuses to do so, by means whereof your orators are and have been greatly injured, and are now prevented from putting the

11 said invention and discovery into successful operation, and are deprived and prevented from receiving the gains and profits to which they are lawfully entitled from the exclusive rights and privileges so granted and secured to them as aforesaid, and which they would have derived and acquired, and would now derive and acquire, but for the said wrongful acts of the said defendant, to their damage ten thousand dollars.

And your orators pray that the said defendant may be compelled by a decree of this honorable court to account for and pay over unto your orator all such gains and profits as have accrued or arisen to, or been earned or received by, the defendant by reason of such unlawful manufacture, use, and sale, or any one of said acts, and all such gains and profits as your orators would have received but for the said wrongful acts and doings of the said defendant, and also all damages your orators have sustained thereby, and that this honorable court will assess the same, or cause them to be assessed, under its direction, and will increase the same in its discretion as provided by law.

And that the said defendant and the defendant's attorneys, solicitors, clerks, servants, agents, and workmen may be perpetually enjoined and restrained by the decree of this court from directly or indirectly making or causing to be made, using or causing to be used, or vending to others to be used in any manner, any musical instrument, or any device or

mechanism containing or embodying the said invention, described and claimed by said letters-patent, re-issued No. 4486, as aforesaid, and from infringing or violating the said letters-patent by the use or sale of the said invention or discovery, or any part thereof, in any way whatever.

12 And that the said defendant may be decreed to pay the costs of this suit; and that your orators may have such other relief as the equity of the case may require and as to your honors may seem meet.

To the end therefore that the said defendant may, if the defendant can, show why your orators should not have the relief hereby prayed, and may full, true, direct, and perfect answer make according to the best of the defendant's, or the defendant's clerks', agents', or workmen's knowledge, remembrance, information, and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were here repeated, paragraph by paragraph, and the defendant and they were thereto severally and specifically interrogated, and more especially that the defendant may, upon the corporal oaths of the officers thereof, according to the best and utmost of their information, knowledge, and belief, full, true, and direct answer make unto the several interrogatories hereinafter numbered and set forth, that is to say:

1st. Whether the defendant is not a corporation, organized as set forth in this bill, and whether said corporation has not its manufactory and principal place of business in said city of Boston and district of Massachusetts?

2nd. Who are the officers of said corporation, and what relation to the same is or has been held by Henry Mason and Emmons Hamlin?

3d. Whether the defendant has not made or sold, since the 30th day of May, 1872, and prior to the date of filing of this bill, melodeons or similar musical instruments which contained tremolo fans or beaters, used on said instruments, in combination with reeds through which the air was drawn by the exhaust action of the bellows, and how many, since October 1st, 1872?

4th. Whether the defendant has not, since the 30th day of May, 1872, and prior to the date of filing of this bill, made or sold, or caused to be made or sold, musical instruments containing tremolo fans or beaters, actuated by independent mechanical devices, and whether the defendant has not done the same in each month of said interval?

5th. Whether the defendant has not, since the 30th day of May, 1872, and prior to the date of filing this bill, made or sold, or caused to be made or sold, reed musical instruments, containing wind-wheels as motors, for actuating tremolo mechanisms, and in each month of said interval?

6th. Whether the defendant has not, since the 30th day of May, 1872, and prior to the date of filing this bill, and in each month of said interval, made or sold, or caused to be made or sold, reed musical instruments, containing tremolo attachments of the kind usually sold in the Mason and Hamlin cabinet-organs, and like the tremolo device marked "Complainants' Exhibit No. 1," which can be seen at the office of the clerk of this court?

7th. Whether the complainants are not the sole and exclusive owners of the re-issued letters-patent No. 4486, granted to El Dora Louis, administratrix, for an improvement in melodeons?

8th. Whether the defendant did not, during the original term of said letters-patent, take a license from said LaFayette Louis, under said pat-

ent, and pay royalties thereunder up to the time of the decease of said Louis, in the year 1869?

May it please your honors to grant to your orators a writ of subpœna ad respondendum issuing out of and under seal of this honorable court, directed to the said defendant, commanding the defendant to be and appear, and make answer unto this bill of complaint, and to perform and to abide by such order and decree herein as to this court may seem required by the principles of equity and good conscience.

May it also please your honors to grant to your orator' a provisional or preliminary injunction issuing out of and under the seal of this honorable court, enjoining and restraining the defendant and the defendant's attorneys, solicitors, clerks, servants, agents, and workmen to the same purport, tenor, and effect hereinbefore prayed for in regard to said perpetual injunction.

And your orator' will ever pray, &c.

B. E. VALENTINE,
Solicitor for Complainant'.

13 UNITED STATES OF AMERICA,
District of Massachusetts, County of Worcester, ss:

Andrew H. Hammond and Authur A. Goodell, being duly severally sworn, deposes and says, that they are the complainants in the foregoing bill named, and have severally read the same, and knows the contents thereof. That the said bill is true of their own knowledge, except as to those matters which are therein stated to be on their information and belief, and as to those matters believe it to be true.

A. H. HAMMOND.
A. A. GOODELL.

Sworn to before me this second day of December, 1872.
[SEAL.] CHAS. B. WHITING,
Notary Public.

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5 On the third day of March, A. D. 1873, the defendants filed the following plea, namely:

Defendants' plea.

The plea of The Mason & Hamlin Organ Company, defendants, to the bill of complaint of Andrew H. Hammond and Authur A. Goodell.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, for plea thereunto say that the said complainants have no interest in any claim for any infringement of the said letters-patent set forth in the bill, and cannot maintain any suit or proceedings therefor or founded thereupon against these defendants, and are estopped therefrom because that heretofore and before the said complainants exhibited their bill in this honorable court, to wit, on or about the 10th day of April, 1861, the said La Fayette Louis mentioned in said bill, in his life-time, for a valuable consideration, entered into a certain agreement, in writing, with Henry Mason and Emmons Hamlin,
a copy of which is hereto annexed, and marked "Exhibit A,'
16 by which he agreed to manufacture and furnish to said Mason

& Hamlin certain tremolo attachments as therein stated, and in default thereof licensed them and their legal representatives to make said articles under said letters-patent of November 18, 1856, and to sell the same in all parts of the United States, and these defendants are the legal representatives and successors and assigns in business and interest of said Mason & Hamlin, and that the said Louis has at all times wholly neglected and refused to manufacture and furnish to said Mason & Hamlin, and to these defendants, the attachments referred to in said agreement Exhibit A, as provided for in said agreement, or otherwise, and thereby the said Mason & Hamlin and these defendants became and now are licensed as set forth and referred to in said agreement, Exhibit A; and further, because on or about the 25th day of September, 1868, the said La Fayette Louis, in his life-time, made, and on the 11th day of November, 1868, filed in the Patent-Office, a certain application for letters-patent for a certain alleged invention to the Patent-Office of the United States, a copy of which is hereto annexed and marked "Exhibit B," and then and there made and entered, for a valuable consideration, into and duly executed to and with these defendants, the Mason & Hamlin Organ Company, three certain agreements, copies of which are hereto annexed and marked "Exhibits C, D, and E." That said agreements C, D, and E related to the said application of said Louis for a patent, and to the said letters-patent issued to said Louis and mentioned and set forth in the bill, and dated respectively November 16, 1856, No. 16094, re-issued February 26, 1867, No. 2498, and again May 26, 1868, No. 2944, and the same include and cover the further re-issue of said letters-patent set forth and mentioned in the bill, viz, the re-issue of the patent of November 16, 1856, dated July 25, 1871, No. 4486.

And the said Mason & Hamlin Organ Company paid, on account of the royalty mentioned in the said Exhibit D, the sum of fifteen hundred dollars at or about the time of executing said exhibits, and in advance of any liability for the same accruing thereon.

17 And said application for letters-patent by said Louis was afterwards, on or about the 26th day of February, 1869, rejected and refused by the said Commissioner of Patents, and never has been granted, and said Mason & Hamlin Organ Company failed to procure the same.

And said agreements, and each and all of them, were duly recorded in the Patent-Office prior to any of the assignments mentioned in the complainants' bill, and are now in force, and have never been revoked, set aside, or annulled, and the defendants crave leave to refer to the originals thereof as part of this their plea.

And these defendants have never at any time since the issue of the said last re-issued letters-patent, dated July 25, 1871, No. 4486, *he* made, sold, or used any tremolo for musical instruments except like and in accordance with the specific mechanism described and set forth in said application for a patent, marked "Exhibit B," and in the drawing and model accompanying the same, and referred to in said Exhibits C, D, and E.

And the defendants, by reason of the matters aforesaid, allege and charge the fact to be that in and by the said papers, agreements, &c., copies of which are hereto annexed, marked "Exhibits B, C, D, and E," the said La Fayette Louis sold, assigned, and transferred to the said Mason & Hamlin Organ Company all and every interest that he or his ·irs, executors, administrators, and assigns had, or might or could at any time have, in said letters-patent issued and re-issued to him, and mentioned in the bill, so far as the same were, or might or could be, in-

fringed by the making, use, or sale of any tremolos for musical instruments, constructed substantially in accordance with his said application for a patent, a copy of which is hereto annexed and marked "Exhibit B," or constructed as made, sold, and used by the defendants; and that all and every interest in any claim for infringement of the said letters-patent set forth in the bill, or any re-issue thereof, by the making, use, or sale of the devices aforesaid, was, and is by said papers and agreements,
wholly transferred and vested in the Mason & Hamlin Organ Com-
18 pany, and not in the said La Fayette Louis, his executors, administrators, or assigns, or in the complainants, and that, upon the death of said Louis, no claim for any such alleged infringement did or could pass or be vested in his administratrix, or in the complainants, and that the said complainants have no interest therein or title thereto, and cannot maintain any suit or proceedings therefor, and that the said defendants, in and by said agreement, Exhibit A, are fully licensed and authorized to manufacture and sell the said tremolo attachments without any responsibility to the said La Fayette Louis or his assigns, or the complainants.

And therefore these defendants do plead the matters and things aforesaid in *the* bar of the said complainants' said present bill, and humbly pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

WHITNEY & BETTS,
Defendants' Solicitors.

FREDERIC H. BETTS,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Lowell Mason, president of the Mason and Hamlin Organ Company, being duly sworn, does depose and say that he has read the foregoing plea to the bill of complaint in this suit, and that the same is true in fact, and is not interposed for the purpose of delaying said suit, or any proceedings therein.

LOWELL MASON.

Sworn to before me this 1st day of March, 1873.
[NOTARIAL SEAL.] SPENCER C. DOTY,
Notary Public, N. Y. C.

I certify that in my opinion the foregoing plea of the Mason & Hamlin Organ Company, defendants, to the bill of complaint of Andrew H. Hammond and Arthur A. Goodell, complainants, is well founded in law, and proper to be filed in the above cause.

FREDERIC H. BETTS.

19 EXHIBIT A.

Articles of agreement made and concluded this 10th day of April, A. D. 1861, by and between La Fayette Louis, of the city of Saint Louis, in the State of Missouri, of the first part, and Henry Mason and Emmons Hamlin, manufacturers of musical instruments, and copartners, doing business in the city of Boston, in the State of Massachusetts,

under the firm and style of "Mason and Hamlin," of the second part, witnesseth:

That whereas the said Louis is the owner of an invention called the "patent tremolo" attachment, for melodeons and reed instruments, for which he has letters-patent, bearing date November 18th, 1856: Now, the said Louis covenants, promises, and agrees to and with the said Mason & Hamlin that he will manufacture and furnish to them the said attachment, manufactured under the said letters-patent, in such quantities as they may order, to be made in materials, finish, and quality of workmanship similar to the first invoice received by the said Mason & Hamlin this day, to the satisfaction of said Mason & Hamlin, at the price of one dollar each. And the said Louis further agrees that if he shall fail to furnish and supply the said Mason & Hamlin with such quantities of said articles and of the quality aforesaid, at the said price, as they shall or may order from him, then in that case the said Mason & Hamlin shall have the right, and are hereby licensed, to make said articles under said letters-patent, and to use and sell the same in connection with the musical instruments manufactured by them, and the said right to sell shall extend to all of the United States. And they are hereby licensed to use and sell the articles so ordered and purchased from him, said Louis, as aforesaid, under said letters-patent, in all parts of the United States. And the said Louis further covenants to and with the said Mason & Hamlin that he has good right and authority so to manufacture and sell to them said articles under said letters-patent, and has in himself good right and lawful authority to license them to make, use, and sell the same as afore-
20 said, and that he will warrant, protect, and defend them against the claims and demands of all persons claiming by, through, or under him, or under said letters-patent, and also against the claims and demands of all persons claiming under any other letters-patent now extant, in the use and sale of said articles, or in the manufacture thereof, under the conditions aforesaid. And the said Mason & Hamlin covenant and agree to and with said Louis that they will purchase said articles of him at the price aforesaid, and of no other person, so long as he shall furnish the same in answer to their orders, of a satisfactory quality, and keep and perform his covenants, to protect and defend them in the use and sale thereof as aforesaid. And the said parties mutually bind themselves and their legal representatives to the covenants and agreements herein contained, to continue in force until the full expiration of the term for which said letters-patent have been granted, and during such period as the same may be hereafter renewed or extended.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

L. LOUIS. [L. S.]
HENRY MASON. [L. S.]
EMMONS HAMLIN. [L. S.]

Signed in presence of—
L. M. PALMER.
JOHN T. VENNER.

21 EXHIBIT B.

BOSTON, MASS.

To the Commissioner of Patents:

The petition of La Fayette Louis, of Boston, in the county of Suffolk, and State of Massachusetts, respectfully represents, that your petitioner has invented an improvement in keyed reed musical instruments,

which he verily believes has not been known or used prior to the invention thereof by your petitioner.

He therefore prays that letters-patent of the United States may be granted to him therefor, vesting in him, and legal representatives and assigns, the exclusive right to the same, upon the terms and conditions expressed in the acts of Congress in that case made and provided; he having paid fifteen dollars into the Treasury, and complied with the other provisions of the said act.

And your petitioner further prays that you will recognize and acknowledge Crosby, Halsted and Gould as agents and attorneys in presenting and conducting this application, your petitioner hereby authorizing and empowering them to alter and amend the within specification and claim, to sign for him the accompanying drawings, to receive the patent if granted, and in general to do and perform all acts which your petitioner might lawfully do or cause to be done in the premises, although the same are not hereinbefore specifically enumerated and described.

Signed this 25th day of September, A. D. 1868.

LA FAYETTE LOUIS.

[50 cents internal-revenue stamp.]

COUNTY OF SUFFOLK,
State of Massachusetts, ss:

22 On this 25th day of September, A. D. one thousand eight hundred and sixty-eight, before me, the subscriber, a justice of the peace for and within the county, personally appeared the within-named La Fayette Louis, and made solemn oath that he verily believes himself to be the original and first inventor of the within-described improvement in keyed reed musical instruments, and that he does not know or believe that the same was ever known or used prior to his invention thereof, and that he is a citizen of the United States.

FRANCIS GOULD,
Justice of the Peace.

To all whom it may concern:

Be it known that I, La Fayette Louis, of Boston, in the county of Suffolk, and State of Massachusetts, have invented an improvement in keyed reed musical instruments; and I do hereby declare that the following, taken in connection with the drawings which accompany and form part of this specification, is a description of my invention sufficient to enable those skilled in the art to practice it.

My present invention relates to the arrangement of the tremolo-mechanism of melodeons or keyed reed musical instruments, and consists in so arranging a fan-tremolo, which is placed above the wind-chest and in rear of the reeds, that said tremolo shall be operated by the current of air drawn through the instrument by the action of the bellows.

Heretofore, where a fan-wheel or a tremolo-wheel having radial blades has been used, the rotation of which fan-wheel disturbed the regularity of the air-current passing through the reeds, and by such disturbance of the current of air created the tremolo, such rotary fan-wheel has been driven by a mechanism independent of the bellows and the current of air produced thereby, such mechanism having to be operated by the performer or by clock-work. This is objectionable in that it is an

23 expensive addition to the instrument, the mechanism of which is liable to easily get disarranged, and in that it requires extra

effort of the performer to operate it, that is to say, effort in addition to that required to work the bellows, and I obviate this by so combining a fan-tremolo (placed above the wind-chest) with the wind-passages that it is or may be at will operated by the current of wind drawn through the instrument by the bellows.

The drawing represents the parts of a melodeon embodying my improvement.

A shows a rear view of the same.

B is a section on the line, &c., &c. A denotes the bellows; *b*, the wind-chest; *c*, the reeds; *d*, the tremolo-wheel placed above the wind-chest on one side of the reeds, said wheel consisting of a series of radial blades projecting from a shaft, *e*, the blades in their rotation sweeping just in rear of the reeds, and of course interrupting the regularity of the current drawn through the reeds by the exhaust-bellows.

One end of the shaft *e* projects through the end *f* into a wind-box, *g*, said end of the shaft carrying a wind-wheel, *h*.

At one end of this box *g* is a passage *i* leading from the box *g* into the wind-chest *b*, and at the other end of the box is a passage *k* leading into the space above the wind ; air drawn from the box *g*, through the passage *i*, by the action of the bellows, causing air to rush into the box through the passage *k*, the current of air thus produced causing rotation of the wheel *h*, which rotation effects the rotation of the tremolo-wheel *d*, the latter producing the tremble of the air passing through the reeds.

It will thus be seen that by combining a valve (to be operated by a suitable stop) with the passage leading into the wheel-box *g*, the wind-wheel *h* and tremolo-wheel *d* may be instantly set in motion by opening the valve, a portion of the air drawn from the space above the wind-chest rushing through the box *g* and acting upon the wheel *h*, no winding or other mechanism being required to produce the action of the tremolo-wheel *d*, a simple diversion of part of the current of air drawn into the bellows effecting the tremolo.

24 I claim, in combination with the reeds of a melodeon or simple keyed reed musical instrument, a rotary tremolo or fan-wheel placed above the wind-chest and parallel to the reeds, when so arranged that its rotation is effected by the current or currents produced by the bellows, substantially as described.

LA FAYETTE LOUIS.

Witnesses:
FRANCIS GOULD.
GEO. L. ROBERTS.

25 EXHIBIT C.

Whereas I, La Fayette Louis, of Boston, Suffolk County, Massachusetts, have invented an improvement in keyed reed musical instruments, and have this day executed an application for letters-patent for the same; and whereas the "Mason and Hamlin Organ Co." (a corporation organized under the general laws of the State of Massachusetts, and having its legal domicile at Boston) is desirous of purchasing my said invention:

Now, for the sum of one dollar to me paid, the receipt of which is hereby acknowledged, and for other good and valuable consideration by me received from said company, I do hereby assign, sell, and transfer to said Mason & Hamlin Organ Co. all my right, title, and interest in and to said invention and letters-patent which may issue therefore.

To be held and enjoyed by said Mason & Hamlin Organ Co., its successors and assigns, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

And I do hereby authorize and request the Commissioner of Patents to issue said patent to the Mason & Hamlin Organ Co. as the assignees of all my right, title, and interest in and to said invention and letters-patent.

In testimony whereof I have hereunto set my hand and seal this twenty-fifth day of September, A. D. 1868.

LA FAYETTE LOUIS. [L. S.]

[5-cent stamp. "L. Louis, 26th Sept., 1868."]

EXHIBIT D.

This agreement made by and between La Fayette Louis, of Boston, in the Commonwealth of Massachusetts, of the first part, and the
26 Mason & Hamlin Organ Company, a corporation duly established under the general statutes of the said Commonwealth, of the second part, witnesseth:

That whereas letters-patent of the United States, originally issued as number 16094, bearing date November 18th, 1856, and re-issued as number 2498, bearing date February 26th, 1857, and again re-issued as number 2944, bearing date May 26th, 1868, were granted to the said Louis upon his invention of improvements in melodeons therein described;

And whereas letters-patent of the United States numbered 35528, and dated June 10th, 1862, were originally granted to the said Louis upon his invention of improvements in pianos, with melodeon attachments therein described, and after assignment thereof by him have now been assigned to him;

And whereas the said Louis has invented an improvement in keyed reed musical instruments, and has this day executed his application for the grant of letters-patent of the United States to secure the same, and has also made and executed an assignment thereof to the said Mason & Hamlin Organ Company:

Now, therefore, in consideration of one dollar to him paid, and for other good and valuable consideration, the receipt whereof is hereby acknowledged, the said La Fayette Louis hereby grants to the said Mason & Hamlin Organ Company, their assignees and licensees, the right to make, use, and sell the invention last herein above named, and assigned to them as aforesaid, in connection with so much of the inventions secured by the letters-patent already granted and herein above named as is contained in the mechanism described and set forth in the said application for letters-patent and in the specification, drawings, and model accompanying the same.

And, in consideration of the said assignment and license to them, the said Mason & Hamlin Organ Company hereby covenant and agree with the said La Fayette Louis that they, their legal successors and assigns, will pay to him, the said Louis, his executors, administrators, or
27 assigns, the royalty of one dollar for each and every tremolo-mechanism substantially the same as that described and shown in the said application and accompanying specification, drawings, and model which shall be manufactured by them, the said company, their agents, workmen, licensees, and assignees, until the expiration of the term for which the said letters-patent, application for which has been executed, as aforesaid, shall be granted; but it is hereby mutually un-

effort of the performer to operate it, that is to say, effort in addition to that required to work the bellows, and I obviate this by so combining a fan-tremolo (placed above the wind-chest) with the wind-passages that it is or may be at will operated by the current of wind drawn through the instrument by the bellows.

The drawing represents the parts of a melodeon embodying my improvement.

A shows a rear view of the same.

B is a section on the line, &c., &c. A denotes the bellows; *b*, the wind-chest; *c*, the reeds; *d*, the tremolo-wheel placed above the wind-chest on one side of the reeds, said wheel consisting of a series of radial blades projecting from a shaft, *e*, the blades in their rotation sweeping just in rear of the reeds, and of course interrupting the regularity of the current drawn through the reeds by the exhaust-bellows.

One end of the shaft *e* projects through the end *f* into a wind-box, *g*, said end of the shaft carrying a wind-wheel, *h*.

At one end of this box *g* is a passage *i* leading from the box *g* into the wind-chest *b*, and at the other end of the box is a passage *k* leading into the space above the wind ; air drawn from the box *g*, through the passage *i*, by the action of the bellows, causing air to rush into the box through the passage *k*, the current of air thus produced causing rotation of the wheel *h*, which rotation effects the rotation of the tremolo-wheel *d*, the latter producing the tremble of the air passing through the reeds.

It will thus be seen that by combining a valve (to be operated by a suitable stop) with the passage leading into the wheel-box *g*, the wind-wheel *h* and tremolo-wheel *d* may be instantly set in motion by opening the valve, a portion of the air drawn from the space above the wind-chest rushing through the box *g* and acting upon the wheel *h*, no winding or other mechanism being required to produce the action of the tremolo-wheel *d*, a simple diversion of part of the current of air drawn into the bellows effecting the tremolo.

24 I claim, in combination with the reeds of a melodeon or simple keyed reed musical instrument, a rotary tremolo or fan-wheel placed above the wind-chest and parallel to the reeds, when so arranged that its rotation is effected by the current or currents produced by the bellows, substantially as described.

LA FAYETTE LOUIS.

Witnesses:
FRANCIS GOULD.
GEO. L. ROBERTS.

25 EXHIBIT C.

Whereas I, La Fayette Louis, of Boston, Suffolk County, Massachusetts, have invented an improvement in keyed reed musical instruments, and have this day executed an application for letters-patent for the same; and whereas the "Mason and Hamlin Organ Co." (a corporation organized under the general laws of the State of Massachusetts, and having its legal domicile at Boston) is desirous of purchasing my said invention:

Now, for the sum of one dollar to me paid, the receipt of which is hereby acknowledged, and for other good and valuable consideration by me received from said company, I do hereby assign, sell, and transfer to said Mason & Hamlin Organ Co. all my right, title, and interest in and to said invention and letters-patent which may issue therefore.

To be held and enjoyed by said Mason & Hamlin Organ Co., its successors and assigns, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

And I do hereby authorize and request the Commissioner of Patents to issue said patent to the Mason & Hamlin Organ Co. as the assignees of all my right, title, and interest in and to said invention and letters-patent.

In testimony whereof I have hereunto set my hand and seal this twenty-fifth day of September, A. D. 1868.

LA FAYETTE LOUIS. [L. S.]

[5-cent stamp. "L. Louis, 26th Sept., 1868."]

EXHIBIT D.

This agreement made by and between La Fayette Louis, of Boston, in the Commonwealth of Massachusetts, of the first part, and the
26 Mason & Hamlin Organ Company, a corporation duly established under the general statutes of the said Commonwealth, of the second part, witnesseth:

That whereas letters-patent of the United States, originally issued as number 16094, bearing date November 18th, 1856, and re-issued as number 2498, bearing date February 26th, 1857, and again re-issued as number 2944, bearing date May 26th, 1868, were granted to the said Louis upon his invention of improvements in melodeons therein described;

And whereas letters-patent of the United States numbered 35528, and dated June 10th, 1862, were originally granted to the said Louis upon his invention of improvements in pianos, with melodeon attachments therein described, and after assignment thereof by him have now been assigned to him;

And whereas the said Louis has invented an improvement in keyed reed musical instruments, and has this day executed his application for the grant of letters-patent of the United States to secure the same, and has also made and executed an assignment thereof to the said Mason & Hamlin Organ Company:

Now, therefore, in consideration of one dollar to him paid, and for other good and valuable consideration, the receipt whereof is hereby acknowledged, the said La Fayette Louis hereby grants to the said Mason & Hamlin Organ Company, their assignees and licensees, the right to make, use, and sell the invention last herein above named, and assigned to them as aforesaid, in connection with so much of the inventions secured by the letters-patent already granted and herein above named as is contained in the mechanism described and set forth in the said application for letters-patent and in the specification, drawings, and model accompanying the same.

And, in consideration of the said assignment and license to them, the said Mason & Hamlin Organ Company hereby covenant and agree with the said La Fayette Louis that they, their legal successors and assigns, will pay to him, the said Louis, his executors, administrators, or
27 assigns, the royalty of one dollar for each and every tremolo-mechanism substantially the same as that described and shown in the said application and accompanying specification, drawings, and model which shall be manufactured by them, the said company, their agents, workmen, licensees, and assignees, until the expiration of the term for which the said letters-patent, application for which has been executed, as aforesaid, shall be granted; but it is hereby mutually un-

derstood and agreed by and between the said Louis and the said company that the said royalty shall be payable by the said company only when the said tremolos manufactured by them have been sold, and that the said company shall pay the said royalty upon all such tremolos manufactured and sold to the extent of an average of forty tremolos per week, taking into account the entire number manufactured and sold from year to year, and shall be exempt from the payment of any royalty upon all tremolos manufactured and sold in excess of the said average of forty per week, estimated, as aforesaid, upon the whole number manufactured and sold each year; but this privilege and exemption shall not extend to the assignees or licensees of the said company.

And the said company hereby further covenants and agrees with the said Louis that they will keep at their usual place of business correct books of account which shall truly show the number of such tremolos from time to time manufactured and sold by them, and that they will account and pay therefor as often as once in every period of three months.

In testimony whereof the said Louis has hereunto set his hand and seal, and the said Mason & Hamlin Organ Company have caused these presents to be signed by their president and treasurer, and their corporate seal to be hereunto affixed, this twenty-fifth day of September, A. D. eighteen hundred sixty-eight.

LA FAYETTE LOUIS. [L. S.]

[L. S.] LOWELL MASON, JR., *President.*

HENRY MASON, *Treasurer.*

[Stamp.]

28 EXHIBIT E.

This agreement, made by and between La Fayette Louis, of Boston, in the Commonwealth of Massachusetts, and the Mason & Hamlin Organ Company, a corporation duly established under the general statutes of the said Commonwealth, witnesseth:

That whereas the said Louis has invented an improvement in keyed reed musical instruments, and has this day executed his application for the grant of letters-patent of the United States to secure the same, and has also made and executed an assignment thereof to the said Mason & Hamlin Organ Company, and a license to make, use, and sell the mechanism described and set forth in the specification, drawings, and model accompanying the said application under letters-patent originally issued as number 16094, and dated November 18th, 1855, and subsequently re-issued as number 2498, dated February 26th, 1867, and again re-issued as number 2744, dated May 26th, 1868, and also under letters-patent, numbered 35528, and dated June 10th, 1862: Now, therefore, in consideration of one dollar to him paid, and for other good and valuable consideration, the said Louis hereby covenants and agrees with the said company, that if the said company shall fail to procure the letters-patent for which application has been executed as aforesaid, then he, the said Louis, will and does hereby grant unto the said Mason & Hamlin Organ Company the exclusive right under the said letters-patent, already granted, and under any and all re-issues thereof, to make, use, and sell the specific mechanism described and set forth in the said executed application, and in the specification, drawings, and model accompanying the same; and will and does hereby fully authorize and empower the said Mason & Hamlin Organ Company, their successors and assigns, to prosecute and bring to final judgment in any court of law or

equity, in the name of the said La Fayette Louis, as well as in their own name, any and all causes, suits, and proceedings against any and all persons or corporations who may be violating or infringing
29 the exclusive right of the said Mason & Hamlin Organ Company to the mechanism described and set forth in the said executed application, and the specification, drawings, and the model accompanying the same; provided that the said company bear all expenses and pay all costs incurred by reason of such suits and proceedings.

In testimony whereof the said La Fayette Louis has hereunto set his hand and seal this twenty-fifth day of September, A. D. eighteen hundred and sixty-eight.

LA FAYETTE LOUIS. [L. S.]

[5-cent stamp. "L. L., Sept. 20th, 1868."]

Recorded August 1st, 1870. Ey. J. A. W.

This cause was thence continued to the May term of this court, A. D. 1873, when the cause was set down for hearing upon the bill of complaint and defendants' plea, and was argued by counsel for the respective parties.

This cause was thence continued under advisement to this present term, when the following decree is entered, namely:

Decree.

This cause having come on to be heard on the bill and plea at the last term of this court, after hearing the arguments of counsel for the respective parties and due consideration had,

It is ordered and decreed, to wit, (Dec. 2d, 1873,) that the bill of complaint be dismissed, and that the said defendants recover of the said complainants their costs of suit, taxed at thirty-five dollars and ninety-four cents.

30 From this decree the said complainants claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their said appeal to effect, which security is approved by the court, and said appeal is allowed accordingly.

A true copy record. Attest: JOHN G. STETSON, *Clerk.*

31 The opinion of the court, filed at the October term, A. D. 1873, of this court, in accordance with which the decree in this cause was entered December 2d, 1873, is as follows:

Circuit court of the United States, district of Massachusetts. In equity. October term, 1873, to wit, December 2, 1873.

ANDREW H. HAMMOND ET AL. *v.* THE MASON & HAMLIN ORGAN CO. } In equity.

Opinion of the court.

SHEPLEY, *J.*:

This is a bill in equity by the complainants, as assignees and owners of the letters-patent re-issued to El Dora Louis, as administratrix
32 of La Fayette Louis, on the 25th of July, 1871, for an improvement in melodeons or reed instruments, consisting of the application of

mechanism to produce a "tremolo" in the musical note on said instruments. The original patent to La Fayette Louis was issued November 18, 1856.

Defendants, by their plea, admit that they manufacture and sell in connection with their own organs tremolo-attachments made precisely in accordance with the specification, drawing, and model of an application for letters-patent dated September 25, 1868, made by La Fayette Louis, the assignor of the complainants. The plea admits, for the purpose of this hearing, that this mechanism embodies the invention described in the patent of said Louis on which the bill in equity is brought.

The plea sets up a justification in using these mechanisms under a license under the original patent granted by Louis to Mason & Hamlin, the assignors of these defendants, and also under a series of contracts between Louis and the defendants themselves relating to the specific device used by them.

It is not necessary to consider the questions discussed at the bar in relation to the license set up in the plea under the original patent, as we are satisfied that the defendants are protected under their agreements with Louis dated September 25th, 1868.

It appears that Louis, prior to the 25th of September, 1868, made an invention of a combination of the fan-tremolo with a rotary wind-wheel, and applied for a patent for this combination. On the same day he entered into three contracts with these defendants.

The first was an absolute conveyance to the defendants of all his "right, title, and interest in and to said invention and letters-patent which may issue therefor," and authorized the Commissioners of Patents to issue said patent to the Mason & Hamlin Organ Company as the assignees of all his right, title, and interest in and to said invention and letters-patent.

33 The second agreement grants to the defendants the right to make, use, and sell the invention above named, and assigned to them as above stated, in connection with so much of the inventions secured by the letters-patent of November 16, 1856, (on which this suit is brought,) and by a patent of June 10, 1862, "as is contained in the said mechanism." The defendants agree to pay a royalty for each and every tremolo-mechanism substantially the same as that described and shown in the said application and accompanying specifications, drawing, and model until the expiration of the term for which the said letters-patent shall be granted, referring to the letters-patent for which application was on that day made.

This contract provided for one contingency; that was, the granting of letters-patent on the application then made. The invention and the right to use the specific mechanism had been conveyed to the defendants. If by the granting of letters-patent to them as assignees of Louis they should obtain the exclusive right to use the invention, then, in such a case, they were to pay Louis a royalty of one dollar for each tremolo manufactured by them during the term of the patent. The contingency contemplated did not happen. Letters-patent were not granted for the combination applied for.

The third agreement provided for another contingency, namely, the failure of the defendants to obtain a patent for the invention of 1868, which is the case as it now exists. This agreement provided "that whereas the said Louis has invented an improvement in keyed reed musical instruments, and has this day executed his application for the grant of letters-patent of the United States to secure the same, and has also made and executed an assignment thereof to the said Mason &

Hamlin Organ Company, and a license to make, use, and sell the mechanism described in the specification, drawings, and model ac-
34 companying the siad application under letters-patent originally issued as number 16094, and dated November 18, 1856, and subsequently re-issued as number 2498, dated February 26, 1867, and again re-issued as number 2944, dated May 26, 1868, and also under letters-patent numbered 35528, and dated June 10, 1862: Now, therefore, in consideration of one dollar to him paid, and for other good and valuable consideration, the said Louis hereby covenants and agrees with the said company, that if the said company fail to procure said letters-patent for which application has been executed as aforesaid, then he, the said Louis, will, and does hereby, grant unto the said Mason & Hamlin Organ Company the exclusive right, under the said letters-patent already granted, and under any and all re-issues thereof, to make, use, and sell the specific mechanism described and set forth in the said executed application and the specification, drawings, and model accompanying the same."

Taking into consideration the three contracts, it is plain that Louis had invented a new combination of the old parts patented by him. He applied for letters-patent for this new combination. He conveyed to defendants, for a valuable consideration and unconditionally, the invention and the rights to make, use, and sell the specific mechanism described in the application, including the old parts as well as the new combination. If the defendants succeeded in obtaining a patent for the new combination, they were to pay a royalty in addition to the consideration they had already paid for the invention. But if no letters-patent could be obtained, the defendants were none the less the owners of the right to make, use, and sell the "invention" and "the mechanism it contains," and the "specific mechanism" described in the application.

Independent of the granting, re-issuing, or extension of any letters-patent, without limitation of time, they had purchased and taken a conveyance of the right to make, use, and sell those specific de-
35 vices in that specific combination. This is what they do use, and this only, and this they have a right to use.

Their right is not limited to the term of the original patents embracing the parts of the combination. It is true that the third contract, in case of failure to obtain a patent for the new combination, grants to the defendants the exclusive right, under the patents already granted for the parts, to make, use, and sell the specific mechanism described in the application for letters-patent for the new combination. But they had the right to use this specific mechanism. The license under the old patents was only intended to make this right exclusive—their exclusive right under them might end with the expiration of the term of the old patents, but their right was independent of their existence or duration.

Bill dismissed.

36 UNITED STATES OF AMERICA,
Massachusetts District:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings, including the opinion of the court, in the cause of Andrew H. Hammond et al. v. The Mason and Hamlin Organ Company, in this court determined.

In testimony whereof I have hereunto set my hand, and affix the seal of said circuit court, at Boston, in said district, this twelfth day of

March, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

[SEAL.] JOHN G. STETSON,
Clerk.

37 By the honorable John Lowell, one of the judges of the circuit court of the United States for the district of Massachusetts.

To the Mason and Hamlin Organ Company:

Whereas Andrew H. Hammond and Arthur R. Goodell have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Massachusetts, made in favor of you, the said Mason and Hamlin Organ Company, and have filed the security required by law; you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Boston, in the district of Massachusetts, in the first circuit, the 31 day of January, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN LOWELL,
District Judge.

38 Due service of the within citation and of a copy of the petition on appeal is admitted by the Mason & Hamlin Organ Company.

WHITNEY & BETTS,
Solrs. for Defts.

39 *Bond to party on appeal.*

Know all men by these presents, that we, Andrew H. Hammond, of the city of Worcester, in the district of Massachusetts, as principal, and Charles M. Clapp, of Boston, and Henry A. Gould, of Chelsea, both in the district of Massachusetts, as sureties, are held and firmly bound unto the Mason and Hamlin Organ Company in the full and just sum of five hundred dollars, to be paid to the said Mason and Hamlin Organ Company, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the thirty-first day of January, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately at a circuit court of the United States began and holden at Boston, within and for the district of Massachusetts in the first circuit, in a suit in equity depending in said court between Andrew H. Hammond and Arthur A. Goodell, complainants, and the Mason and Hamlin Organ Company, decree was rendered against the said Hammond and Goodell, and the said Hammond and Goodell having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Mason and Hamlin Organ Company, defendant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on second Monday of October next:

Now, the condition of the above obligation is such, that if the said Hammond and Goodell shall prosecute their said appeal to effect, and

answer all damages and costs, if *he* fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

A. H. HAMMOND. [L. S.]
CHARLES M. CLAPP. [L. S.]
HENRY A. GOULD. [L. S.]

Signed, sealed, and delivered in the presence of—

Approved:
J. LOWELL,
Dist. Judge.

Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 205. Andrew H. Hammond & Arthur A. Goodell, appellants, vs. The Mason and Hamlin Organ Company. Massachusetts C. C. U. S. Filed 11 July, 1874.

Supreme Court of the United States.

ANDREW H. HAMMOND and
ARTHUR A. GOODELL,

Appellants,

vs.

THE MASON and HAMLIN ORGAN COMPANY.

No. 205.

BRIEF FOR APPELLANTS.

B. E. VALENTINE,
Counsel for Appellants,
ASTOR HOUSE,
New York City.

BROOKLYN.
WM. C. WILTON, LAW PRINTER, 397 FULTON ST.
1876.

Supreme Court of the U. S.,

ON APPEAL FROM THE

Circuit Court for the District of Massachusetts.

ANDREW H. HAMMOND, *et al.*,
Appellants.

vs.

THE MASON and HAMLIN ORGAN COMPANY.
Respondents.

ABSTRACT OF CASE.

This action was brought by Bill in Equity before the Circuit Court of the United States, in the District of Massachusetts, for an infringement of Letters Patent. The defendants interposed a Plea, which was sustained and the Complainants' Bill dismissed, from which decree an appeal is taken to this Court.

The Letters Patent on which the suit was brought were *extended* Letters Patent, and the complainants were owners by assignment. The original Letters Patent were granted Nov. 18, 1856, and had been three times re-issued. The features claimed in said Letters Patent were devices to produce a tremulous note in reed instruments, or that class of musical instruments which are provided with wind-bellows, and as alleged in the Bill, (fol. 9) consisted of the following features :

A tremolo-valve, fan, or beater substantially as specified in said specification, in combination with the reeds of the melodeon, or instrument in which the air is drawn through the reeds by the exhaust action of a bellows.

A tremolo-beater, actuated by independent mechanical devices, substantially as specified in said specification.

Pulsating mechanism, adapted without cutting off the continuous flow of air past the pulsator, to produce in bellows-instruments the tremulous notes.

The Letters Patent had been originally issued to one Louis, who was the inventor, (fol. 4.) and after his death were *extended* for the benefit of his widow, (fol. 6.) who sold the extended term to the complainants, (fol. 7.)

The defendants by their plea set up several agreements which it is alleged the said Louis the original patentee executed to the defendants, in his lifetime and during the original term of the Letters Patent, by which agreements the defendants claim to be licensed and privileged to use the patented invention, not only during the original term of the Letters Patent, but also during the *extended term* thereof.

These agreements are in two sets. The first is an agreement made April 10th, 1861, (Exhibit A. fol. 19.)

The second set comprises Exhibits B. C. D. & E. (fols. 21 to 28.) made September 25, 1868.

The effect of the first agreement (Exhibit A, fol. 19) was not passed upon by the Court, as the Court decided that the agreements dated Sept. 25th, 1868, were a sufficient license to protect defendants (fol. 32) and on those agreements alone dismissed the Bill.

There was no question but that the acts of the defendants, if not protected by these agreements, were *an infringement* of the patent, and the Court below so finds saying (fol. 32): "Defendants by their plea admit that "they manufacture and sell tremolo attachments, &c., "and that the machine embodies the invention described "in the patent, &c., on which the Bill in Equity is "brought."

The Agreements of September 25th, 1868.

What do the agreements and Exhibits of the date of Sept. 25th, 1868, show?

We have seen by the Bill that in 1856 Louis invented and patented the *fundamental element* or device of a beater or fan, for making a tremolo in musical instruments. [See claim, fol. 9.]

About the 25th of September, 1868, he made a further invention which, though a distinct invention, was an improvement or development of the fundamental device. Having previously invented the fan, he at the latter date invented a new *method of actuating* the fan which he described in Exhibit B, (fol. 21). The fan or beater as originally invented was revolved by clock-work, &c., but by the second invention of Louis the fan was to be placed on the same shaft as a wind-wheel, and revolved by the latter (fol. 22.) This was of course a distinct invention, for which a distinct patent might issue, and a sale of the latter invention, would not be a sale of the first invention.

Now we can concisely and correctly state the case up to a certain point by reciting the decision of Judge Shepley in the Court below.

He says, (page 16 of the Record, fols. 32–35): "It appears that Louis made an invention of a combination of the fan-tremolo with a rotary wind-wheel, and applied for a patent for the combination. [This application is Exhibit B, fols. 21–24.] On the same day he entered into three contracts with the defendants."

THE FIRST AGREEMENT.

"The first (Exhibit C, fol. 25) was an absolute conveyance to the defendants of all his right, title and interest in and to said invention, and Letters Patent which may issue therefor, and authorized the Commissioner of Patents to issue said patent to the Mason and Hamlin Organ Company as the assignee of all his right, title and interest in and to said invention and Letters Patent."

THE SECOND AGREEMENT.

"The second agreement (Exhibit D, fol. 26) grants "to the defendants the right to make, use and sell the "invention above-named, and assigned to them as above "stated, *in connection with* so much of the inventions "secured by the Letters Patent of November 16th, "1856, (on which this suit is brought) and by a patent "of June 10, 1862, as is contained in the said mechan- "ism. The defendants agree to pay a royalty for each "and every tremolo mechanism substantially the same "as that described and shown in the said application "and accompanying specifications, drawing and model, "until the expiration of the term for which the said "Letters Patent shall be granted, referring to the Let- "ters Patent for which application was on that day "made. This contract provided for one contingency; "that was the granting of letters patent on the appli- "cation then made * * * * The contingency con- "templated, did not happen. Letters patent were not "granted for the combination applied for."

THE THIRD AGREEMENT.

"The third agreement (Exhibit E, fol. 28) provided "for another contingency, namely, the failure of the "defendants to obtain a patent for the invention of "1868, *which is the case as it now exists.* This agree- "ment provided, that whereas the said Louis has in- "vented an *improvement* in keyed reed musical instru- "ments and has this day executed his application for "the grant of Letters Patent of the United States to "secure the same, and has also made and executed an "assignment thereof to the said Mason and Hamlin "Organ Company, *and a license* to make, use and sell "the mechanism described in the specifications, draw- "ings and model accompanying the said application, "*under Letters Patent* originally issued as number 16,- "094, and dated November 18, 1856, and subsequently "re-issued as number 2498, dated February 26, 1862,

"and again re-issued as number 2944, dated May 26,
"1868; and also under Letters Patent numbered 35528
"and dated June 10, 1862. Now, therefore, in consid-
"eration of one dollar to him paid and for other good
"and valuable consideration, the said Louis hereby cov-
"enants and agrees with the said company that if the
"said company fail to procure said Letters Patent for
"which application has been executed as aforesaid, then
"the said Louis will and does hereby grant unto the
"said Mason and Hamlin Organ Company, *the exclusive*
"*right under the Letters Patent already granted*, and un-
"der any and all re-issues thereof, to make, use, and
"sell, the specific mechanism described and set forth in
"the said executed application, and the specification,
"drawings and model accompanying the same."

Thus far the facts and documents as recited in the opinion are correct, but the *conclusions* by the Court below as deduced in the closing part of the opinion, the result of which is to declare that the three agreements operated to give the defendants a license to use the specific mechanism described in the application of September 25th, 1868, during not only the original term of the patent now in suit, but also under the *extension* thereof; and that "the defendants had taken a conveyance of the right to make, use and sell those specific devices *independent of the granting*, re-issuing, or extension *of any Letters Patent*," are errors and misconstructions of the law, and of the three agreements in question, which this Court will correct by a reversal.

POINTS FOR APPELLANTS.

We shall base our argument to show the error of the Court below, on certain firmly established and indisputable principles of law which are so well settled that for the purposes of this case we may call them axioms.

First is the law that is laid down in the words of this Court as follows: "There is no artificial rule in construing a contract, and effect, if possible, *is to be given* "*to every part* of it, in order to ascertain the *meaning of* "*the parties* to it. An assignment of an interest in an "invention secured by Letters Patent is a contract, and "like all other contracts is to be construed so as to "carry out the *intention of the parties* to it."

Nicholson Pav't Co. v. Jenkins, 14 Wall. 452.

Second.—That where upon an agreement between two parties, their mutual undertakings are embodied in two or more instruments simultaneously executed, in determining the rights and *intentions* of the parties, the several instruments must be *construed together* as one entire contract, and no one instrument can be singled out, and broad rights claimed under it as unaffected by conditions or restrictions in the other simultaneously executed instruments.

Cornell v. Todd, 2 Denio 130.
Jackson v. Dunsbagh, 1 Johns. Cas. 92.
Craig v. Wells, 11 N. Y. 315.
Hull v. Adams, 1 Hill 601.

Third.—That a grantee or licensee of a right to make or sell under the original term of a patent acquires no rights to continue such manufacture or sale under an *extended term* of said patent *unless such right be conveyed to him in express terms* by the patentee.

Woodworth v. Sherman, 3 Story 171.
Curtis on Patents, § 198 and cases cited.

That where the terms of the grant are ambiguous, or capable of two constructions, the presumption is, that

no right in the extension of a patent was intended, and this presumption can be overcome only by proof.

Hodge v. Hudson River R. R., 6 Blatchf. 165.

The grant of a right during the *term* for which said Letters Patent are or *may be granted* does not convey any rights under an extended term.

Hodge v. Harlem Rail Road, 6 Blatchf. 85.

Nor is the grant of "an invention" or of "*Letters Patent and the invention*" any broader than the grant of "Letters Patent" merely: the addition of the word "*invention*" to the grant conveys no interest in an extended term.

Clem v. Brewer, 2 Curtis 506. [Foot of p. 520.]
Wilson v. Rosseau, 4 How. 646.

But when the two terms are united and a grant is made of an "*invention*" together with the Letters Patent which have or "*may be granted*," then, for the first time does the language indicate the intention to grant a right under a future term or extension.

Rail Road Co. v. Trimble, 10 Wall 367.
Nicholson Pav't Co. v. Jenkins, 14 Wall 452.

It is also clear that the assignee of an inventor can only take such rights as exist in the inventor.

Tatham v. Loring, 5 N. Y. Leg. Obs. 207.

A grantor can not make an assignment of a bare right or a possibility.

Woodworth v. Sherman, 3 Story, foot of p. 174.

Judge Story says: "This doctrine is expressly applicable to *licensees* under the Patent Act, and indeed as I think, *a fortiori* applicable because the whole design of the section of the act, providing for renewed patents, is, in terms exclusively confined to the original inventor, and to be for his sole benefit, and not for the benefit of his licensee or assignee; and therefore that section is to receive a corresponding construction in favor of the inventor alone.

3 Story, p. 175.

Fourth.—There is no right of property in a mere invention as distinct from the rights conferred by the Patent law.

"The mere mental process of devising an invention "enters not into the nature of *property* according to the "common law ; it forms no class or division in any of "its enumerations or definitions of estates or properties "and is a matter too shadowy for the practical charac- "ter of that sturdy system."

Gaylor v. Wilder, 10 How. 503.
Donaldson v. Beckett, 4 Burr 2305.

The furthest extent to which the courts have gone has been to declare that after a patent has been granted, they will recognize and enforce assignments made prior thereto ; but it is only on the ground that a patent *has in fact issued.*

In the language of this Court—"The inventor of a new and useful improvement has no exclusive right to it, until he obtains a patent. This right *is created by the patent.*"

Gaylor v. Wilder, 10 How., top of p. 493.

A party may have an *inchoate right* in an invention before a patent issues, but he has no such property which he can *assign or convey* unless he *has acquired* the *inchoate* right, and has also "the *power* to make the right perfect, *and complete at his pleasure.*"

Same case, 10 Howard, p. 493.

Fifth.—The owner of an *improvement* can not take possession of the *invention improved upon.* He must obtain a license under the prior patent to use the improvement, or await the expiration of the older patent.

Colt v. Mass. Arms Co., 1 Fisher 108.

Having stated the foregoing propositions, which we believe to be well established law, and to comprehend

the principles involved in this case, we will state what we consider the

ERRORS OF THE COURT BELOW.

The Court below erred in its decision by saying—

1st. That "the invention and *the right to use the specific mechanism* had been conveyed to the defendants" by the agreement Exhibit C.

[See fol. 33 of Record, paragraph 2.]

2nd. The Court erred in its decision by saying that Louis "conveyed to the defendants *unconditionally* the invention, and the *right to make, use and sell the specific mechanism* described in the application, including the old parts as well as the new."

[See fol. 34 of Record, paragraph 2.]

3d. The Court erred in its decision by saying—"*Independent* of the granting, re-issuing or extension of any *letters patent, without limitation of time*, they had taken a conveyance of the right to make, use and sell those specific devices in that specific combination."

[See fol. 34 of Record, last paragraph.]

4th. The Court erred in its decision by saying of the defendants that "their *right is not limited* to the terms of the *original patents* embracing the parts of the combination * * * * they had the right to use the specific mechanism — their *exclusive* right under the patents might end with the expiration of the term of the old patents, but their right was *independent of thetr existence* or duration."

The three Agreements of September 25th, 1868.

Let us consider the three agreements Exhibits C, D and E. to see what they really do convey.

First, look at Exhibit C. (fol. 25 of Record.)

Suppose this agreement had been executed *alone*, and unaffected by Exhibits D and E., what would it convey to

the defendants? The only words which have any force by way of grant are in the last three lines of the page (12) which say: "I do hereby assign, sell and transfer to said Mason and Hamlin Organ Company all my right, title and interest in and to *said invention*, and Letters Patent which may issue therefor."

What does "said invention" refer to? Not to the original invention covered by the Letters Patent on which this suit was brought, but only the distinct and further invention described in Exhibit B (fol. 21) which is declared to relate only to a *peculiar arrangement* of previously patented elements. The inventor who had as he supposed, made two distinct inventions, had a right to take out a patent for each, and to sell either one independent of the other.

This agreement Exhibit C, *does not* (as the Court below would have it supposed,) sell the new invention and *the right to use all the mechanism* shown therein. *It contains no such words.* The most that could be argued from Exhibit C is, that if in fact a new patent on the application Exhibit B, had been granted and the parties of the second part had been *led into the belief* that they had Louis' *implied permission* to make the devices that were shown in Exhibit B without being subject to any demands under his old elementary patent, Louis might possibly have been *estopped* from asserting his rights under his original patent. But that estoppel could have operated only during the *original term* of the patent, and would not have applied to the *extension*, for an *actual license* would have given no privilege under the extended term, unless especially so stated, much less would an *implied* license have done so.

We say then that, if Exhibit C had been the only agreement executed between the parties, and unlimited by any further agreements, the most that could be demanded on the part of the grantees would be that there was an *implied* license under the original patents, and

that implied license would end with the *term* which was then vested in the grantor, to wit, the original term of the patent.

Louis would only be estopped on the ground that he ought to have said something about his rights under the *first patent* if he did not wish to convey a wrong impression.

But the parties recognizing the fact that by Exhibit C they were dealing with only the second distinct invention, *took particular care to have it understood* that Exhibit C should contain *no implied license* under the original patent. So they drew up a second agreement, Exhibit D, (fol. 26) in which they recite that "Whereas Letters "Patent of the United States, originally issued as No. "16094, bearing date November 18th, 1856, and re-"issued, &c., were granted to said Louis; and whereas "said Louis has invented an *improvement*, &c., and has "this day executed his application for the grant of Let-"ters Patent of the United States to secure the same, "and has also made and executed an assignment thereof "to the said Mason and Hamlin Organ Company. Now "therefore, in consideration of one dollar, &c., the "said Lafayette Louis hereby grants to the said Ma-"son and Hamlin Organ Company, &c., the right to "make, use, and sell the invention last herein above-"named, and assigned to them as aforesaid, in connec-"tion with so much of the invention secured by the "*Letters Patent already granted*, and herein *above-named*, "as is contained in the mechanism described and set "forth in the said application, &c."

This shows conclusively that the parties recognized the fact that the first agreement (Exhibit C) gave the defendants no rights under the original patents, and so they *took a license* "to make, use, and sell the second in-"vention in connection with the Letters Patent *already* "*granted*."

This agreement (Exhibit D) contemplated the issuing of the second patent, and even in that event, the words

"*already granted*" would restrict the license to the original term of the patent in suit.

The third agreement (Exhibit E) points out still clearer than ever what the parties intended, and believed they had accomplished by the other two agreements, for it characterizes those agreements (Exhibits C and D) in the following words (fol. 28): "Whereas "said Louis has invented an improvement, &c., and has "this day executed his application for the grant of Let- "ters Patent, &c., and has also made and executed an "assignment thereof to said Mason and Hamlin Organ "Company, *and a license to make, use, and sell* the mech- "anism described and set forth in the specification, "drawings and models accompanying said application "*under Letters Patent* originally issued as number 16094, "and dated November 18th, 1856."

The parties here recited that they had taken the right to make, use and sell the specific mechanism shown in the new improvement, not as the Court below says in its decision, "*irrespective* of Letters Patent" but in express terms "*under* said Letters Patent No. 16094." Their license under that patent would end with the original term of that patent,—even if the two contracts (Exhibits C and D) became operative by the allowance of the patent applied for on the improvement.

The only granting words in the third agreement are, that said Louis in a certain contingency (which has happened) "does hereby grant unto the Mason and Hamlin "Organ Company, the *exclusive right* under the Letters "Patent *already granted*, and under any and all *re-issues* "thereof, to make and sell the specific mechanism de- "scribed in the executed application."

Where does the Court below find authority for saying in its conclusions (fol. 34): "He conveyed to the de- "fendants *unconditionally* the invention and the rights "*to make, use and sell the specific mechanism* described in "the application, including the old parts as well as the "new combination."

Exhibit C, says nothing about the right to make, use and sell "*the specific mechanism.*"

Exhibit D, does give the right to make, use, and sell the "invention," and "the specific mechanism," but it is not "unconditionally" but "in connection with what is "secured by Letters Patent *already granted.*"

Exhibit E, recites that the right which they had taken to make, use, and sell the mechanism described, was "*under Letters Patent* already issued as number 16094." (fol. 28.)

How then can the Court say, in the face of all this, "that they had taken a conveyance of the right to "make, use, and sell those specified devices in that "specified combination, '*independent of the granting, "re-issuing or extension of any Letters Patent, and without "limitation of time.*'" (Fol. 35 of Record.)

THE REAL INTENTION OF THE PARTIES.

Now, placing ourselves in the position of these parties, and looking at the surrounding circumstances, and taking all these agreements together as parts of one contract, it is evident that what they intended was this: Louis had a patent which covered and controlled all pulsating mechanisms for making a tremolo. He devised an improved way of arranging it with other devices. The Mason and Hamlin Organ Company were desirous of obtaining the right to this particular combination to the exclusion of all other manufacturers. Louis could give them this exclusive right in two ways.

1st. By getting a patent on the new invention, and selling them the new patent, and giving them a license under the old one.

2nd. By giving them an exclusive license under the old patent, and refusing everybody else a license who wished to make and sell the new mechanism. In either case Mason and Hamlin could prevent other parties from using the new combination, but in the first case they

could control the new combination for seventeen years —the term of the proposed new patent ; in the second case, they could control it only during the time of such exclusive license as they had under the old patent. In either case they would have exclusive rights, but in the one case the time would be longer than in the other.

The application for the new patent was not granted. It was evidently intended that in that event exhibits C and D should not be operative for any purpose, but that Exhibit E. should be the only operative part of the contract.

If we are to decide this case according to the intent of the parties, it is evident that on a failure to obtain a patent for the new improvement, the parties intended to rely entirely on the third agreement (Exhibit E) and that the other two exhibits C and D should be of no effect.

But giving the three agreements full effect, either singly or together, no right passed to the defendants under the Letters Patent in question except during the *original term* thereof.

The law is laid down that "it is not presumed that a "grantor intends to grant more than he has a right to "grant, or that a grantee intends to receive by way of "grant that to which he has a full right without a "grant."

4 Blatchf. 277.

At the time Louis made the three agreements in question he had only the original term of the patent in suit. There is nothing to show that he contemplated licensing the defendants under an extension ; the contracts all refer to a term of a patent *already granted.*

In the case of Mowry v. Grand Street R. R., the Court says : "An assignment of an invention without words "importing an intention to convey both a present and "a future interest, will not pass the right to an exten- "sion. Such words being absent from the instrument "under consideration, the intention must be considered

"as absent. It was easy to have inserted such words, "but this was not done ; and in view of the rights of "the inventor to apply for and secure an extension, "their absence leads to the conclusion that the parties "did not contract with reference to it."

Mowry v. Grand Street R. R. Co., 10 Blatchf. 93.

So too with reference to a *license*. Mr. Justice Blatchford, collating all the authorities on the subject, in the case of Hodge v. Hudson River R. R. Co., says : "In "the present case the entire right covered by the pa- "tent was not granted but merely a *license* to use the "invention, and such license is to continue during the "term for which said Letters Patent are or may be "granted ; the term for which *said* Letters Patent were "granted or might be granted, was a term ending Oc- "tober 2, 1863. It is *impossible* on any fair construc- "tion of the language, and of the adjudicated cases, to "hold that the license was intended by the parties to "cover an extended term of the patent."

Hodge v. Hudson River R. R. Co., 6 Blatchf. 85.

In the case at bar there was no ambiguity in the terms employed. Louis licensed the defendants under the Letters Patent "already granted" and any "re-issue" thereof, i. e., re-issue of the term already granted. If he had intended to give them any further rights, he would have used the words "extended term thereof" as he had used them in the agreement Exhibit A in 1861.

It would be doing violence to common sense and the evident purpose of the parties, to hold that the patentee in this case for the sum of *one dollar* intended to give an exclusive license during several remaining years of his patent, and a free license under a further extended term, in this valuable invention—yet such would be the effect of the decision of the Court below.

And unless the Court means to over-rule the cases cited above, and authorities collected therein, and to overthrow the heretofore established doctrine, that a

conveyance or license must contain words showing it is the *intention* of the parties to convey rights under an extended term before either an interest or a *license* in such extension will pass: and unless this Court also means to have it decided there is *property* in an invention which can be transferred, and be the subject of sale and license irrespective of the rights created by the Patent Law; and also to hold that the mere sale of an *improvement* carries the right to use the invention improved upon, during both original and extended terms; it must reverse the decision appealed from.

The Agreement of April 10th, 1861. (Exhibit A.)

The Court below did not pass upon the effect of nor give any weight to the agreement of April 10th, 1861, which is set forth in the Record as Exhibit A, (fol. 19,) and it is not believed that this Court will attach any weight to it.

It is proper however that we should present it to the Court in its correct light.

The defendants are neither licensed by, nor are they entitled to any privilege by virtue of the agreement Exhibit A.

1. The agreement provides that Mason and Hamlin shall be licensed to make certain articles if the patentee "shall fail to furnish and supply" said Mason and Hamlin with the said articles "*as they shall or may order from him.*" Now it is true, as alleged in the plea, that the said Louis did not *supply* Mason and Hamlin with said articles, but the reason was that said Mason and Hamlin *never ordered any* from him. Nor does the plea *allege* that they ever ordered any. Where the vesting of a license is dependent upon the happening of *two* things, as is the case in the contingency we are now considering, viz.: the *ordering* of the articles and the *failure to supply* them, it is not enough to allege the failure to supply, but it must also be alleged that the articles *were ordered*, which there was a failure to supply.

The plea does not allege the happening of the two contingencies which were to be precedent to the vesting of any license. Had this been done the complainants would have *replied* and proved the contrary.

2. In case of the happening of the contingency which would have vested in Mason and Hamlin a license, what would it have been a license for? Only "to make *said articles.*" Not to make, use and sell any articles whatever that were covered by the patent, but to make *said* articles which are limited by the agreement itself (See Record, fol. 19) to attachments "similar to the first invoice received by said Mason and Hamlin this day." The license in any event would have been limited to a right to make articles *like the attachments specified.* The plea does not allege that those were the kind of attachments the defendants are now making, but on the contrary, alleges that they are making attachments like the improvement invented in 1868, (Plea, fol. 17.)

3. If the agreement, "Exhibit A," had ever become operative as a license to any one, it would have been to *Mason and Hamlin* only, and not the Mason and Hamlin Organ Company. This agreement "Exhibit A" was made and bears date in 1861, long before the Mason and Hamlin Organ Company was organized, and when Mason and Hamlin were only a private firm. The agreement itself shows that the license which was to vest on the happening of the contingencies was *not* a license to Mason and Hamlin *and their legal representatives* as the plea alleges.

"When the allegations of a plea to a bill of equity "are qualified by a reference to a paper annexed to "the plea and declared to be a part thereof, the plea "must be read as if the paper was introduced in its "very terms into the body of the plea."

Wheeler v. McCormick, 4 Fisher's Pat. Cases 333.

We see by Exhibit A that the contemplated license was only to the *said* Mason and Hamlin, i. e., "Henry Mason and Emmons Hamlin, manufacturers of

"musical instruments, and co partners, doing business "in the City of Boston, in the State of Massachusetts, "under the firm and style of Mason and Hamlin."

(See Exhibit A, fol. 19.)

The law is not in doubt upon what a license is. It is not an interest in a patent. "It is merely a *power*, that renders the doing of a thing lawful, which would otherwise be unlawful.

3 Story 162.

Therefore in this case the particular parties were specified who were to have that power. A license differs from an assignment: it is a naked power which cannot *descend* nor *be transferred*.

Brooks v. Byam, 2 Story 525.

Even if the license which was to accrue under Exhibit A, had been to Mason and Hamlin *or their assigns*, it is doubtful whether anything could have passed to the defendants.

Brooks v. Byam, 2 Story 525.

But the words "or assigns" are not contained in "Exhibit A," nor was the license to be to the "*legal representatives*" of Mason and Hamlin, as the defendants would urge. The only mention made of "legal representatives" was to *bind* the legal representatives to the covenants of payments due from Mason and Hamlin. No mention was made of vesting them with power or rights of manufacture.

The privilege of a license therefore had it ever arisen, would have been merely a personal privilege limited to the private firm of Mason and Hamlin.

Each of the three reasons specified, is a distinct and sufficient answer to any claim of the defendants to a license or personal privelege under exhibit A.

The judgment of the Court below, should be reversed, and the cause remanded to the Circuit Court with instructions to enter judgment for the plaintiffs on the plea.

B. E. VALENTINE,

Of Counsel for Appellants.

Supreme Court

OF THE UNITED STATES,

ON APPEAL

From the Circuit Court of the United States,

FOR THE DISTRICT OF MASSACHUSETTS.

ANDREW H. HAMMOND, ET AL.,

vs.

THE MASON AND HAMLIN ORGAN COMPANY.

Statement of Facts, and Points on behalf of Respondents and Appellees.

FREDERIC H. BETTS,

Counsel for Respondents & Appellees.

New York:

John Polhemus, Printer, 102 Nassau Street.

Supreme Court of the United States,

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

ANDREW H. HAMMOND *et al.*,

vs.

THE MASON & HAMLIN ORGAN CO.

STATEMENT OF FACTS.

This suit is founded upon an alleged infringement of a patent granted to one Lafayette Louis for an alleged improvement in melodeons, consisting of a "tremolo attachment."

The bill alleges the grant of the patent to Lafayette Louis, on November 16, 1856; its reissue on Feb. 26, 1867, and again on May 26, 1868; the death of Louis in 1869, and the appointment of his widow as administratrix; the extension of the patent in November, 1870; a third reissue on July 25, 1871, and the assignment to the complainants on May 30, 1872.

The bill then charges infringement of the 1st, 2d, 4th and 5th claims of the reissue, and prays an injunction and account.

The defendants by their plea admit that they manufacture and sell, in connection with their own organs, tremolo attachments made precisely in accordance with the specification, drawing and model of an application

for Letters Patent (Exhibit B), dated September 25, 1868, made by Lafayette Louis the assignor of the complainants. For the purposes of this argument it is not here denied that this mechanism embodies the invention described in the patent of said Lafayette Louis upon which this suit was brought, (though if the plea should be overruled it *would* be so contended, such having been the decision in 8 Blatch., p. 440).

The plea of the defendants justifies their action in manufacturing and using these tremolos.

1. Under a license under the original patent of November 18, 1856, granted by Louis to the assignors of the defendants April 10, 1871.

2. Under a series of agreements between Louis and the defendants, relating to the specific device used by them, dated September 25, 1868.

The case was brought to a final hearing before his Honor, Judge Shepley, in the before-mentioned Court, and his decision was in favor of the defendants ; the bill was dismissed.

The opinion is found in the record, at pages 15 to 17.

The complainants thereupon appealed to this Court.

Points on Behalf of the Defendants and Appellees.

FIRST POINT.—THE DEFENDANTS ARE LICENSED UNDER THE LICENSE of APRIL 10, 1861, TO MAKE AND SELL THE TREMOLO COMPLAINED OF.

The Court below did not consider it necessary to consider this license, but it is here treated of for the sake of completeness.

This license recites the fact that "Louis is the owner of an invention called the 'patent tremolo' attachment for melodeons and reed instruments for which he has Letters Patent bearing date November 18, 1855."

(Defendants' Plea, p. 10 fol. 19.)

This "Patent Tremolo" is designated throughout the agreement, sometimes as an "attachment," and sometimes as an "article."

Louis then agrees with Mason & Hamlin (defendants' assignors) that he will manufacture and furnish to them "*the said attachment*, manufactured under the said Let-"ters Patent, in such quantities as they may order, to be "in *material, finish* and *quality* of *workmanship*, simi-"lar to the first invoice received by said Mason & Ham-"lin this day to the satisfaction of said Mason & Hamlin "at the price of one dollar each."

"And the said Louis further agrees (fol. 19) that if he shall fail to furnish and supply to the said Mason & Hamlin, with such quantities of said article, and of the quality aforesaid, at the said price as they shall or may order from him, *then in that case the said Mason & Hamlin shall have the right, and are hereby licensed to make said articles under said Letter Patent*, and to use and sell the same in connection with the musical instruments manufactured by them, and the said right to sell shall extend to the whole of the United States.—"

* * * * & * * * * *

"and the said parties mutually bind themselves, *and their legal representatives* to the covenants and agreements herein contained, to continue in force until the full expiration of the term for which Letters Patent have been granted, and during such period as *the same may be hereafter renewed and extended* (fol. 20).

In considering this license, it is to be noted that—

1. This license enures to the benefit of the *defendants*. "The covenants and agreements" bind the "legal representatives" of the respective parties, and therefore the privileges and benefits secured by these covenants and agreements enure to the benefit of these same "legal representatives."

The defendants allege themselves to be (fol. 16) the "*legal representatives*, and successors and assigns in business and interests of said Mason and Hamlin."

This is admitted by the setting down of the plea.

2. This license is not confined to any special *form* of

attachment, except that it is "under the said Letters Patent."

Louis, it seems, furnished Mason & Hamlin with a sample device, and agreed that all Tremolos *he* should thereafter furnish, should correspond in "*materials*, *finish*, and *quality* of *workmanship*."

In case of his default Mason & Hamlin "*are hereby licensed to make said articles under said* Letters Patent." But *they* are not restricted to "making" them of any special form (except that they are to be under said Letters Patent), or of special "materials," "finish," or quality. There would be no reason for any such restrictions. What *they* make for their customers, could be of no moment to Louis, as, in case of his *default*, their license was *free*, as will be more fully presently seen.

3. The license to Mason & Hamlin became operative because Louis "wholly neglected and refused to manufacture and furnish to said Mason & Hamlin and to these defendants the attachments referred to in said agreement" (fol. 16). This is acknowledged by the setting down of the plea.

4. The defendants are doing now only what the license allowed them to do. They are "making said articles under said Letters Patent," and "using and selling the same in connection with musical instruments manufactured by them."

The charge in the bill is that they have "made, used "and sold melodeons and reed musical instruments in "which the air is drawn through the reeds by exhaust "or rarefaction, each and all containing the said inven- "tion."

5. The license is *free*. If Louis furnished the attachments he was to be paid a dollar for each of them if, however, he made default, and Mason & Hamlin made them for themselves, no royalty is provided for, and it would be manifestly absurd to have the dollar royalty apply in that case, as it would throw the burden of expense of manufacturing on Mason & Hamlin.

This would be putting a *premium* on making default.

5. The license runs into the present extended time of

the patents. Those are the express terms of the contract (fol. 20).

6. The reissues have of course no effect on the right of the licensees. Being licensed under the original patent, their license extends to the reissues.

But it was contended in the Court below, and may be urged here, that the license to Mason & Hamlin, contained in Exhibit A, never became operative, because, though Louis failed to supply them with the patented tremolo, yet it was because Mason & Hamlin never ordered any. The fact is understood to be otherwise; but the rights of the parties are now to be determined, not by any actual facts that *might* be proved, but by the allegations of the plea, as admitted.

It was contended that the vesting of the license was dependent on the two contingencies. 1st, the *ordering* of the patent tremolos. 2d, the *failure* to *supply* them.

It was said that the plea does not allege that they (Mason & Hamlin) ever ordered any.

The answer to this is to be found by an inspection of the plea itself; at folio 16 it is alleged: "That the said "Louis has at all times wholly neglected and *refused* to "manufacture and furnish to said Mason & Hamlin, "and to these defendants, the attachment referred to in "said agreement Exhibit A, *as provided for in said* "*agreement or otherwise.*"

Here is a distinct allegation, that Louis failed to furnish the attachments "as provided for in said agreement."

If the agreement provides for an "order" as a preliminary to a supply, then the failure to supply after an order, is necessarily involved in the allegation of a failure to supply "as provided for in said agreement." Again. The allegation is not only that Louis failed or neglected to supply the attachments, but that he "refused" to supply them "as provided for in the said agreement.

A refusal implies a request or "order;" a man cannot "refuse" to do a thing for another, unless the other gives an invitation.

In any event a "refusal," before request made, always discharges from the obligation to give the "order."

Again, it was contended that Mason & Hamlin were

restricted to making tremolo attachments *identical* with a certain sample invoice. This has been already considered. It may, however, be added that the words "said articles," which Mason & Hamlin are licensed to make, evidently refers to the "patent tremolo attachment" generally, and not to any particular "materials," "finish," or "quality workmanship."

The tremolo now manufactured by Mason & Hamlin may differ in shape from the particular sample furnished by Louis in 1861, but if it is, as is claimed, made *substantially in accordance with* the patent of November 18, 1856 (and it must be, if it is an infringement), then manifestly it is one of "said articles" "for which he (Louis) has Letters Patent" and is therefore one of "said articles which" Mason & Hamlin are licensed to make.

It is to be noticed also that, by the agreement Exhibit A, while Louis is required, as is usual in such cases, to conform to certain "materials, finish and quality of workmanship," no requirement of the kind is specified in case Mason & Hamlim make the articles.

Such a requirement in their case would be most unusual. Nor is it specified that either Louis or Mason & Hamlin must make the "patent tremolos" of any particular shape or proportions, except that it is to be "under" or substantially in accordance with said Letters Patent.

This is what the complaint charges them with doing, and if true, is the thing they are licensed to do.

Again, it was contended that the license was limited to Mason & Hamlin, individually and personally, and did not extend to their "legal representatives," these defendants. This was urged on the theory that a license is not assignable, and hence though expressly made in favor of legal representatives, cannot be assigned or pass to them.

Licenses, it is true, are not assignable if it appears by their terms that they are intended as personal privileges only, but any apt words (as in this case) will make a license assignable.

The case of Brooks *v.* Byam, cited by complainants below, does not go to the length claimed.

As to the assignability of a license, see

Woodworth *v.* Curtis, 2 Wood & Min., 527.
Wilson *v.* Stalley, 5 McLean, 2.
Troy Iron, &c., Fact *v.* Corning, 14 How., 216.

SECOND POINT.—THE DEFENDANTS ARE PROTECTED UNDER THEIR AGREEMENTS WITH LOUIS, DATED SEPTEMBER 25TH, 1868.

These are the agreements on which the Court below based its decision in favor of the defendants. The correctness of that opinion is fully justified by the analysis of the agreements hereto given.

It appears by the context of the agreements, that about the date indicated Louis made an invention of the *combination* of a fan tremolo with a rotary wind-wheel, and that he applied for a patent for such combination.

(See Exhibit B, pp. 10 to 12.)

Having invented this combination, and having on the 25th day of September, 1868, made an application for a patent therefor, he, on that same day, entered into three agreements with the defendants, annexed to the plea, and marked Exhibits C, D, and E.

The defendants' plea is as follows:

"And these defendants have never at any time since "the issue of the said last Reissued Letters Patent, "dated July 25, 1871, No. 4486, made, sold, or used any "tremolo for musical instruments, *except like and in ac-* "*cordance with the specific mechanism described and set* "*forth in said application for a patent marked Exhibit* "*B, and in the drawing and model accompanying the* "*same, and referred to in said Exhibits C, D, and E.*"

The thing "described and set forth" in the application, Exhibit B, is the "invention" of 1868, and nothing else.

The truth of this plea is admitted.

The point to be determined, therefore, is whether, under these three agreements, Exhibits C, D, and E, the defendants acquired the right to use the invention described in the application for a patent, Exhibit B, as they say they have done, and whether that right is subject to any limitation as to time; for it is contended by the complainants that all right of the defendants under these agreements, to do what they are doing, expired with the original term of Louis' Patent of November 18th, 1856, and November 18th, 1870.

This question is to be determined by an analysis of these several agreements, which will be considered separately in their order.

Louis "assigned, sold, and transferred" to the defendants, for value, all his "right, title, and interest in and to said *invention* and Letters Patent, which may issue therefor."

(See Exhibit C, p. 12.)

Under this agreement is to be noted:

1. The invention itself—the "Combination of fan tremolo and rotary wind-wheel" is sold to the defendants," to be "held and enjoyed" by them "as fully and entirely as the same would have been held and enjoyed by me, had this assignment and sale not been made."

2. It is not the "Letters Patent" only that is here conveyed, nor the "invention as secured by the Letters Patent," but the "invention *and* Letters Patent."

The former is entirely independent of the latter, and the title to it would be as little affected by the failure of the latter as would be the title to a lot by the destruction of a house upon it.

3. This distinction was clearly recognized by the Courts in Gear *v.* Grosvenor. (Official Gazette, U. S. Pat. Off., Vol. 3, p. 380, note.)

4. The conveyance is made absolutely and entirely. There is no proviso expressed that "this agreement shall be void in case Letters Patent are not granted." None such can be implied.

We find then, that this "invention" Louis granted to

the defendants not for any *limited* term, but *absolutely* and *forever*, and he granted *also* any Letters Patent that "*may* issue for said invention" to the end of the term for which they should issue, *i. e.*, *seventeen* years from 1868; and Louis granted this invention to the defendants "to be held and *enjoyed*" by them "as *fully and entirely* as the same would have been held and *enjoyed by me* (Louis) had this assignment and sale not been made."

Is it consistent with this agreement and the "enjoyment of the invention by the defendants as *fully* and *entirely* as Louis would have done, that after two years' use of the "invention," it should *not* only be thereafter not "fully and entirely" *enjoyed*, but should, by Louis' assignees, be "fully and entirely" *prevented*, as would be the case if the complainant's theory is to be accepted, that the defendants' interest in the invention lasted only during the original term of Louis' Patent of 1856, *i. e.*, till November, 1870.

If this invention of 1868 embodied the same substantial features as those described in the patent of 1856, then a license under the patent of 1856 is implied in the grant of the right to use the invention of 1868 as "fully and entirely" as the grantor could do so.

Part of the grantor's (Louis) right of "full and entire" enjoyment of the invention of 1868 was the right under the patent of 1856, so far as the two interfered; having granted such "full and entire" enjoyment to the defendants, neither he nor the complainants, his assignees, can be heard to assert a paramount title over the very thing granted "fully and entirely."

This is the view taken of this agreement (C) by the Court below; in the opinion referred to, it spoke as follows:

> "The first was an absolute conveyance to the defendants of all "his 'right, title and interest in and to *said invention* and Letters "Patent which may issue therefor,' and authorized the Commis- "sioners of Patents to issue said patent to the Mason & Hamlin Or- "gan Company, as the assignees of all his right, title, and interest "in and to *said invention* and Letters Patent."

II. The second of said agreements (Exhibit D,) grants to said Mason & Hamlin Organ Company "the right to

make, use, and sell the *invention* (assigned to them, and which they have since used and are now using) * * * in connection with so much of the inventions secured by the Letters Patent" on which this suit is brought (November 16, 1856), and by a patent of June 10, 1862, "as is contained in the said mechanism."

"Until the expiration of the term for which the said Letters Patent (for which application was then about to be made) * * * shall be granted," the defendants agree to pay "a royalty of one dollar for each and every tremolo mechanism substantially the same as that described and shown in the said application and accompanying specification, drawings and model." (See Exhibit D, p. 13.)

It is to be noted that

1. This agreement contemplates, and provides for the special and expected contingency of the granting of the Letters Patent (for which application was about to be made), and secures in such case the rights of the respective parties. In consideration of the *exclusiveness* of the right, if thus secured to the Mason & Hamlin Organ Co., a royalty is secured to Louis to be paid on all the tremolos so protected that are "manufactured," * * * such payment to continue until the expiration of the protecting patent.

2. Nothing is said of the right to manufacture ceasing either before or after the expiration of the original term. It is not conditional on the granting of the Letters Patent. The royalty is to be paid solely in case of the grant of a *patent* for the invention and during its term. The *invention* itself belonged to Mason & Hamlin by the prior agreement. When the protection ceased then the payment of royalty was to be discontinued.

3. The fact that the *invention* is sold and not the Letters Patent only, is even more fully expressed than before. The latter is not mentioned except as limiting the *time* of the obligation to pay royalty.

There is granted the new *invention*, and whatever is *common to it*, and to the inventions secured by Letters Patent of November 18, 1856, and June 10, 1862, "already granted."

4. The rights of the grantee are not stated, because in the contingency contemplated they are well defined by law.

The Court below was of the opinion that this agreement was to be construed as here contended.

Judge Shepley said in regard to it as follows:

"The second agreement grants to the defendant the right to make, "use and sell the invention above named, and assigned to them as "above stated, in connection with so much of the inventions secured "by the Letters Patent of November 16, 1856, (on which this suit is "brought) and by a patent of June 10, 1862, 'as is contained in the "said mechanism," the defendants agree to pay a royalty for each "and every tremolo mechanism substantially the same as that de- "scribed and shown in the said application and accompanying speci- "fications, drawing and model until the expiration of the term for "which the said Letters Patent shall be granted, referring to the "Letters Patent for which application was on that day made.

"This contract provided for one contingency—that was, the grant- "ing of Letters Patent on the application then made. The invention "and the right to use the specific mechanism had been conveyed to "the defendants. If by the granting of Letters Patent to them as "assignees of Louis they should obtain the *exclusive* right to use the "invention, then, in such a case, they were to pay Louis a royalty of "one dollar for each tremolo manufactured by them during the term "of the patent. The contingency contemplated did not happen. "Letters Patent were not granted for the combination applied for."

III. The third agreement, Exhibit E, contemplates and provides for the case of the *failure* of Mason H. Hamlin Organ Co. *to obtain a patent* for the invention of 1868; which is the case as it actually happened and now exists.

In case the application for Letters Patent is refused, Louis grants to the Mason & Hamlin Organ Company "the *exclusive* right under the said Letters Patent already granted (*i. e.*, those of November 18, 1856, and June 10, 1862), and under any and all Reissues thereof, to make, use, and sell the *specific mechanism* described and set forth in the said executed application (of 1868) and in the specification, drawings, and model accompanying the same."

And "authorizes and empowers" them "to prosecute and bring to final judgment * * all persons * * violating or infringing" their "exclusive right" to the said "mechanism."

(See Exhibit E, p. 14.)

make, use, and sell the *invention* (assigned to them, and which they have since used and are now using) * * * in connection with so much of the inventions secured by the Letters Patent" on which this suit is brought (November 16, 1856), and by a patent of June 10, 1862, "as is contained in the said mechanism."

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It is to be noted that

1. This agreement contemplates, and provides for the special and expected contingency of the granting of the Letters Patent (for which application was about to be made), and secures in such case the rights of the respective parties. In consideration of the *exclusiveness* of the right, if thus secured to the Mason & Hamlin Organ Co., a royalty is secured to Louis to be paid on all the tremolos so protected that are "manufactured," * * * such payment to continue until the expiration of the protecting patent.

2. Nothing is said of the right to manufacture ceasing either before or after the expiration of the original term. It is not conditional on the granting of the Letters Patent. The royalty is to be paid solely in case of the grant of a *patent* for the invention and during its term. The *invention* itself belonged to Mason & Hamlin by the prior agreement. When the protection ceased then the payment of royalty was to be discontinued.

3. The fact that the *invention* is sold and not the Letters Patent only, is even more fully expressed than before. The latter is not mentioned except as limiting the *time* of the obligation to pay royalty.

There is granted the new *invention*, and whatever is *common to it*, and to the inventions secured by Letters Patent of November 18, 1856, and June 10, 1862, "already granted."

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"This contract provided for one contingency—that was, the grant- "ing of Letters Patent on the application then made. The invention "and the right to use the specific mechanism had been conveyed to "the defendants. If by the granting of Letters Patent to them as "assignees of Louis they should obtain the *exclusive* right to use the "invention, then, in such a case, they were to pay Louis a royalty of "one dollar for each tremolo manufactured by them during the term "of the patent. The contingency contemplated did not happen. "Letters Patent were not granted for the combination applied for."

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And "authorizes and empowers" them "to prosecute and bring to final judgment * * all persons * * violating or infringing" their "exclusive right" to the said "mechanism."

(See Exhibit E, p. 14.)

In this agreement is to be noted that,

1. It provides for the contingency *opposite* to that contemplated in the preceding, namely, the rejection of the application of September 25, 1868, by securing in that event, for a received and acknowledged price, not the *use* of the invention of 1868, for that had been granted, but the *exclusiveness* of such use by the grantee for a certain limited period, *i. e.*, till the expiration of the patents of November 18, 1856, and June 10, 1862.

2. It corroborates the above construction of the last agreement (Exhibit D), that the conclusion of obligation to pay royalty does not affect the right to manufacture (II. 2,); for while it contemplates and provides for the event of the failure to patent the invention of 1868, it provides for no royalty in that event.

The refusal of the Patent Office to patent this invention destroys not the *right* of Mason & Hamlin in the same, but the *exclusiveness* of their right. The agreement is not thereby annulled; still less is the agreement Exhibit C, affected.

3. Lest the refusal of Letters Patent should give opportunity to say that, as there was no "patentable" invention, nothing could be assigned by the agreements Exhibits C and D, the word "invention" previously used is supplemented by the words "specific mechanism."

This puts it beyond all doubt that in all these agreements it is the "combination" in question, of fan tremolo and rotary wind-wheel, whether new or old, whether patentable or unpatentable, that is absolutely sold.

It is claimed, however, by the complainant, that inasmuch as the agreement, Exhibit E, contains no license under the patent of 1856, during the extended term of that patent, and the original term having expired, that the defendants can now be sued for infringing such extended term.

To this the answer is plain. The agreement Exhibit E, is *not* one that *limits* any right granted under the former agreement, but grants *new* rights under certain contingencies.

As we have already seen, the *invention* of 1868 *itself* was made the property of the defendants by Exhibit C.

The grant of that invention carried with it a right to *use* it forever, and a right over it *exclusively, if* a patent for it could be obtained. The agreement Exhibit E, does not in any way take away or limit that right of *use* forever; but, for a sum paid, provides that in the event that the defendants fail of obtaining *exclusive* protection for *seventeen years* under a patent of *their own* for the new invention of 1868, that then they shall for a *limited* period have *exclusive* protection under two patents of *Louis*, the one on which this suit is brought (Nov. 16, 1856), and one of June 10, 1862. Such *limited* period of exclusive protection under those two patents was to expire with the expiration of those patents, which would be, unless they were extended in about two years for the one of 1856, and in about eleven years for the one of 1862; but the expiration of the *exclusive* rights under those patents does not affect the right to use the invention which was absolutely granted to the defendants in the agreement Exhibit C.

The complainants are seeking to read the agreement E which contains no limitation of the *general* right to use the specific mechanism referred to in it, as if it contained a clause to this effect, "but whenever the original term of the patent of November 18, 1856, shall expire, *all* right to use the invention assigned in Exhibit C shall cease, and *all* right to manufacture and sell said invention under the patent of June 10, 1862, shall cease likewise."

This clause imposing a forfeiture of rights absolutely granted by another agreement will not be supplied by construction, not only because forfeitures are never implied, but because the intent of the agreement, as we have seen, is plainly otherwise.

It would require very strong words to carry the construction that a man intended to *absolutely* grant an invention by one agreement, and on the same day by another agreement, prohibit its use by the grantee after two years.

The law leans very strongly against all conditions and restrictions in an absolute grant which are inconsistent with such absolute grant certainly they will not supply

such conditions and restrictions by forced constructions, when none such in fact exist.

As illustrative of this principle may be cited:

In case of a grant, when no condition is attached, but it is absolute in its terms, the Court cannot raise one by implication.

United States *v.* Segur, 10 Pet., 306, Supreme Ct., 1836.
United States *v.* Kodman, 15 Pet., 130, Supreme Ct., 1841.

Conditions subsequent, especially when relied on to work a forfeiture, must be created by *express terms* or *clear implication*, and are construed strictly.

Gadbury *v.* Sheppard, 27 Miss., 203.
Ludlow *v.* New York and Harlem R. R., 12 Barb., 440.
Merrifield *v.* Cobleigh, 4 Cush., 678.
Bradstreet *v.* Clark, 21 Pet., 388.

The prohibition of a particular use or manner of enjoyment of the thing absolutely granted is *void* for *repugnancy.*

Craig *v.* Wells, 1 Kern., 315.

From these considerations the law and facts defining the relations of the parties may be summed up as follows:

1. The invention for which Letters Patent were refused was a new combination of old parts, claimed to have been invented by Lafayette Louis, the complainant's assignor.

2. The right to use this combination was unconditionally given to the defendants by its author.

3. The refusal of Letters Patent for this invention destroyed the *exclusiveness* of the right of the defendants to manufacture and use it, without affecting that right. It does not prevent the defendants from manufacturing the combination, but refuses protection against others.

The obligation to pay royalty was all that ended.

4. The right to make, use and sell the old parts described in the application was as unconditionally given as the combination itself.

5. The absolute sale of the invention, and all of the

mechanisms, and the combination of mechanism that the application contains, conveys a title entirely separate from any *Letters Patent* whatsoever, whether granted or expected.

Those patents are or would be a *protection* of title, not a title.

6. The relations of the parties are the same as they would be if no application to patent the invention Exhibit B had ever been made.

7. The grantor in selling "the invention," and the "mechanism that it contains," parted with all his claims to that identical arrangement of devices, under any and all Letters Patent, and under any and all extensions thereof.

8. The ommission of the word "extensions" in the license Exhibit E, can have no greater power than to lead to the opinion that no *exclusive* right under the extension of the patent of 1856 is thereby granted. The word was not necessary to assure the right of the defendants to the thing itself, which had been deeded to them independent of any exclusive privileges in it.

9. The intent of the grantor was clearly to convey the right to manufacture, use and sell, without limit of time. When property is given in fee the conveyances need not state that it is given "forever." Time is mentioned only in the agreement D, where in consideration of the *exclusive* right to be protected by Letters Patent (which consideration failed in the refusal), royalty is promised to be paid until A. D. 1885—through and beyond the extended terms of the prior patents. The right to make, use and sell must have been intended to extend quite as far when the agreement was made. But this right was not dependent on the condition which destroyed the obligation to pay royalty.

The present attempt to confine that grant to the two years between the date of the agreements (Sept. 1868), and the expiration of the original term of the first patent (Nov. 1870), is not supported by the language, nor by the intent of the instruments.

The complainants' assignor having parted absolutely with his right to the combination used by the defendants

and all that it contains, to be held and enjoyed by the defendants as fully and entirely as the same would have been by himself (Ex. C) and having confirmed the right of his grantees by authorizing them, notwithstanding the refusal of Government protection for the specific device, to prosecute all persons infringing on their right under two of his prior patents, (Ex. E) is estopped from sueing them for using the very mechanism granted. It is admitted by the setting down of the plea "that these "defendants have never at any time since the issue of "the said last reissued Letters Patent dated July 25, "1871, No. 4486, made, sold or used any tremolo, for "musical instruments, except like and in accordance with "the specific mechanism described and set forth in said "application for a patent, marked Exhibit B, and in the "drawing and model accompanying the same." Yet, overlooking the real nature of the agreements of the assignor, and exaggerating the omission of the word "extensions" into a practical annulling of all three agreements, the complainants attempt to show that the defendants, by performing the act so expressly authorized, infringe a prior patent of the same assignor.

The absurdity as well as the injustice of this attempt more fully appears, when it is considered that the complainants sue for infringement of the patent of 1856, by the use of a device for making and use of which the defendants hold an exclusive license under the patent of 1862. This has not yet expired and "under" it, the defendants are, in the agreements of 1868, authorized to exclusively manufacture and sell.

It yet remains to be shown how an inventor who owns two patents, both of which he admits to contain a certain mechanism, can sue an exclusive licensee under one of them for infringing the other by the use of the very mechanism licensed.

As to whether the defendants did not obtain, by the force of these agreements, an *exclusive* license under any extended term of the Louis Patent of 1856, as well as under the original term, may well be considered.

There are no express terms of limitation, and it seems manifest that the intention of Louis was to give to the

defendants all the protection he could possibly afford them. Terms expressly alluding to the extended term of this patent are not used in this agreement Exhibit E, but the same words are used as are employed in Exhibit D, as defining the term of the defendants' rights under that patent, and we have already seen, with reference to the latter contract, that it provides for a continuance of the contemplated relations of the parties for *seventeen* years from the date of the grant of the patents about to be applied for, and a payment of royalty during such time. The license under this patent of 1856 could not, therefore, have been intended to terminate at any shorter period than that which Louis was able to confer, and the supposition that he was intentionally reserving to himself the power to make a new demand for royalty, after the lapse of about two years, finds no support in probability.

Judge Shepley rightly interpreted this third agreement as follows:

"The third agreement provided for another contingency, namely, "the failure of the defendants to obtain a patent for the invention of "1868, which is the case as it now exists. This agreement provided, "'That whereas the said Louis has invented an improvement in "'keyed reed musical instruments, and has this day executed his "'application for the grant of Letters Patent of the United States to "'secure the same, has also made and executed an assignment there-"'of to the said Mason & Hamlin Organ Company, and a license to "'make, use and sell the mechanism described in the specification, "'drawings and model accompanying the said application under "'Letters Patent originally issued as number 16,094, and dated No-"'vember 18, 1856, and subsequently reissued as number 2498, "'dated February 26, 1862, and again reissued as number 2944, "'dated May 26, 1868, and also under Letters Patent numbered 35,-"'528, and dated June 10, 1862. Now, therefore, in consideration "'of one dollar to him paid, and for other good and valuable con-"'sideration, the said Louis hereby covenants and agrees with the "'said company, that if the said company fail to procure said Let-"'ters Patent, for which application has been executed as aforesaid, "'then the said Louis will and does hereby grant unto the said Mason "'& Hamlin Organ Company the exclusive right, under the said "'Letters Patent already granted, and under any and all reissues "'thereof to make, use and sell *the specific mechanism* described and "'set forth in the said executed application and the specification, "'drawings and model accompanying the same.'"

Upon a careful review of all the contracts, the Court below rightly reached the conclusion that the defendants

were doing only what the complainant's assignor had expressly assigned and granted to them the right to do, summing up its conclusion in the following words:

"Taking into consideration the three contracts, *it is plain* that "Louis had invented a new combination of the old parts patented "by him. He applied for Letters Patent for his new combination. "He conveyed to defendants, for a valuable consideration, and un "conditionally, the invention and the rights to make, use "and sell the specific mechanism described in the appli- "cation, including the old parts as well as the new combi- "nation. If the defendants succeeded in obtaining a patent for the "new combination, they were to pay a royalty, in addition to the "consideration they had already paid for the invention. But if "Letters Patent could not be obtained, *the defendants were none the less "the owners of the right to make, use and sell the 'invention' and 'the "'mechanism it contains' and 'the specific mechanism,' described in the "application.*"

"Independent of the granting, reissuing or extension of any "Letters Patent, without limitation of time, they had purchased and "taken a *conveyance of the right* to make, use and sell those specific "devices in that specific combination. *This is what they do use and "this only, and this they have a right to use.*

"*Their right is not limited to the term of the original patents* em- "bracing the parts of the combination. It is true that the third con- "tract, in case of failure to obtain a patent for the new combination, "grants to the defendants the *exclusive* right, under the patents "already granted for the parts, to make, use and sell the specific "mechanism described in the application for Letters Patent for the "new combination. But they had the right to use this specific "mechanism. The license under the old patents was only intended "to make this right exclusive—their exclusive right under them "*might* end with the expiration of the term of the old patents, but "their right was independent of their existence or duration."

THIRD POINT.—The bill was properly dismissed.

The Court below did not err, therefore, in its conclusion upon the construction of the agreements. The defendants were fully protected in their actions complained of by virtue of their license of April 10, 1861, and *also* by the conveyance to them of the invention of 1868.

It is, therefore, respectfully submitted that the bill was properly dismissed, and that the decree of the Court below should be affirmed, with costs.

FREDERIC H. BETTS,
Counsel for Respondents.

S. Hamilton's Sons, Printers, 61 Cedar St., N. Y.

Supreme Court

OF THE UNITED STATES.

ANDREW H. HAMMOND, *et al.*,

vs.

THE MASON AND HAMLIN ORGAN CO.

POINTS IN REPLY TO BRIEF OF APPELLANTS.

The brief of the appellants was not filed prior to the filing of that of the respondents, as it contains several erroneous statements, it is necessary for the respondents to reply.

I.—It is necessary first to call attention to the "POINTS OF THE APPELLANTS," commencing on page 6.

These are stated to be "certain firmly established and "indisputable principles of law which are so well set-"tled, that for the purposes of this case we may call "them axioms."

We have a few remarks to make in regard to some of these axioms and their applicability to this c ase.

(*a.*) With the *first* and *second*, which maintain the principle that agreements are to be construed according to the *intention* of the parties, if possible, we have no complaint to make, for it is a rule upon which we rely in this cause. It must, however, be followed in connection with its *limitation*, (*i. e.* if possible), and in view of the further rule that—

"Where there is a doubt as to the proper construction of an instrument this feature (intention) of the case is entitled to great consideration, but where its meaning is clear *in the eye of the law* the *error* of the parties *can not* control its effect."

Railroad Co. *v.* Trimble, 10 Wall, 377.

(*b.*) With reference to the *third* "axiom" we contend that it has no applicability to this case.

The agreement of 1861 between the assignor of the plaintiffs and the predecessors of the defendants *expressly* granted a license during the extended term of the Louis patent of 1856.

The agreement of 1868, under which the defendants claim (Exhibit C), conveys to the defendants the *invention* of using two mechanical elements *together* or *in combination*, absolutely, without restriction of time, such combination being then *unpatented*. The grant *also* covered any Letters Patent which *may* issue therefrom.

The question arises then, whether a party having granted *absolutely* by one agreement the right of using *two* things together, can, after two years, prohibit the use of *one* of those very things at all, because such one was patented by a prior patent of the same party, and no *express* authority to use it during the extension of such prior patent was given.

This question is utterly dissimilar from the questions which have arisen in the cases cited on the appellants brief.

The appellants seek to maintain this position by asserting that the agreement, Exhibit C, which conveyed to the defendant the "invention *and* Letters Patent which

may issue therefor," really conveyed *nothing at all*, because no Letters Patent were in fact granted, and that there is no such thing as an "invention," which can be conveyed apart from Letters Patent.

To this we reply, *first*, that neither a grantor, nor those claiming under him, can not be heard to assert that nothing passed by his grant.

Van Rensaller *v.* Kerney, 11 How., 297.
Clark *v.* Crego, 47 Barb., 599.

And, *second*, that property in an invention which may be the subject of contract and sale, is perfectly plain and well recognized.

An "invention" is the conception and practical embodiment of a useful idea.

"Letters Patent" are the mode of protecting the inventor in the *exclusive* use of it.

He may use it himself or he may sell the knowledge and use of it to others, without any Letters Patent. He may doubtless prevent the surreptious use of his acquired knowledge by others.

But he can not prevent others from *independently* inventing the same thing and using it without Letters Patent.

If he allows it to go into public use without resuming his title, he abandons it, just as the owner of land abandons his right to the exclusive possession, by allowing it to be used as a public highway.

The law recognizes a man's title in an invention apart from Letters Patent, by providing that he may use and sell it for two years before applying for a patent.

Property in an invention, as distinct from property in Letters Patent, is as clear as is that in literary composition as distinct from copyright.

Property in a literary composition, prior to and apart from copyright, is perfectly well recognized by the Courts.

Unpublished manuscripts, letters and other forms of composition are protected as literary property, and their use by others restrained.

It is even true that an invention which is not *new*, and Letters Patent which are void, may be the subject of valid contract of sale.

Taylor *v.* Hare, Davis, P. C., 307.

The fact that an "invention" is something broader and different from Letters Patent, is recognized in nearly every case cited by the appellants.

In Clum *v.* Brewer, (2 Curtiss, 506), Judge Curtiss says: "The deed could not convey and does not purport "to convey an interest in any particular Letters Patent, "or in any *exclusive* right secured by any particular "Letters Patent." It purports to convey "one undivided "fourth part of the *invention*."

The Judge, it is true, states *obiter*, that "I am *inclined* to the opinion that a sale of "the invention" before Letters Patent are obtained, does not *necessarily* carry with it the exclusive right to the extended term," because the extension depends on matters "exclusively *personal* to the inventor himself." But holds the assignment in question, in fact covers an extended term of the patent in question, without any express mention of it.

In Railroad Company *v.* Trimble, 10 Wallace 367, cited by the appellant, it was held, that "a deed by "which a party conveys all his property and estate "whatsoever and wheresoever, of every kind and descrip-"tion, carries patent rights and *extensions*, if the party "owns any."

It was further held that a "deed by which a patentee "of an invention conveys all the right, title and interest "which he has in the 'said invention,' as secured to "him by Letters Patent and also all 'right, title and in-"terest which may be secured to him from time to time;' "the same to be held by the assignee for his own use or "that of his legal representatives, 'to the full end of the "term for which said Letters Patent are or may be grant-"ed;' carries the entire *invention and* all alterations and "improvements *and* all patent whensoever issued and "extensions alike, to the extent of the territory speci-"fied."

In Nicholson Pavement Co., *v.* Jenkins, 14 Wallace 452, this Court recognizes the difference between "an invention" and the Letters Patent for it, when they decide that a deed carries an extended term of the patent, because it conveys to the grantee all the right, title and interest which the patentee has "in the said *invention and* Letters Patent." "The same to be held "and enjoyed by the said party, to the use and "behoof of him and his legal representations to "the full end of the term for which said Letters "Patent are or may be granted as fully and effective by "as the same would have been held and enjoyed by the "assignor had the assignment never been made."

In the note to Gear *v.* Grosvenor (3 Off. Gaz. p. 383), already cited, the same distinction is clearly pointed out.

and also in the late cases Emmons v Sladdin 9 Off. Gaz. Re George & Crompton 9 Off.

We may remark in passing, that the strictness of the earlier cases cited by appellants (3 Story, 174 and 6 Blatch, 85), is not followed in the latter cases of Rail Road Co. *v.* Trimble, and Nicholson Pav. Co. *v.* Jenkins, in this court.

With reference to the *fourth* "axiom," which is alleged to assert that there is no property in an invention as distinct from the right secured by patent, we are surprised to find hat the authority in support of it, is, so far as it touches the question at all, directly the reverse of the position cited. The appellants' supporting quotation being taken from the *dissenting* opinion of the Court.

The subsequent remarks under the same heading are also *incorrect*.

The Courts do hold that the *exclusiveness* of the property in an invention is created by Letters Patent, but not the right to the invention.

The apparent statement of law from 10 Howard, p. 493, omits several important words. The Court there do not say that "a party may have "an inchoate right in "an invention before patent issues, but he has no such property as he can assign or convey" but merely that he has "an inchoate right to its *exclusive* use," and expressly holds that he may assign and convey this.

With reference to the *fifth* "axiom," to the effect that the owner of an improvement cannot take possession of the invention improved upon, we remark that this proposition has no reference to the present case. The proposition refers to cases between separate inventors where one has invented a machine, and the second, an improvement upon it. It is undoubtedly the fact that the inventor of the improvement cannot use the thing improved upon without the consent of the first inventor. But the present case is, where there was an inventor who had a patent for one mechanical element, and afterwards invented its combination with another, and sold the right to use the two combined, absolutely, to a third person, and now contends that having sold the right absolutely to use the two, he can prohibit his assignee from using one of them.

II.—With reference to the argument based upon these alleged "axioms," it is hardly necessary to speak further, in view of their error and inapplicablity. Two or three considerations may, however, be mainiained.

It is admitted by the appellant on p. 10, that if the agreement, Exhibit C, by which the invention of the combination of two elements was sold to the defendants, has stood alone, that it could be contended that Louis was estopped from asserting his rights under his original patent to one of them.

But it is contended that Louis prevented any estoppel from operating by the making of the agreement Exhibit D, which, it is alleged, shows that the parties supposed that the defendants needed a license under the patents of 1856 and 1862 already granted, and that it was only intended to grant them such license during their original term.

This intention is sought to be supported by the fact that the Letters Patent of 1856 and 1862 are mentioned as the Letters Patent " already granted," and that that means the *term* already granted. The intention is also attempted to be supported by the fact that an extension of the said patents is not expressly provided for.

With reference to the first point, it is to be observed that the patents of 1856 and 1862, are mentioned as letters patent "already granted," not as distinguishing an original term from a possible extended term, but as distinguishing the patents themselves from the *application* for a patent for the invention of 1868, which was not then granted.

With reference to the second point it is to be observed that this same agreement after granting a license, without mentioning its period of expiration, provides for the payment of royalty to Louis, for the term of *seventeen years* from 1868. It is obvious, therefore, that the privilege of using the thing granted was not to be shorter than the period during which the royalty was to be paid for its use; and it is obvious that the parties having provided for payments for seventeen years did not intend that the right to use the thing paid for should terminate at the end of two.

We also refer again on this point to the rule of law, already mentioned that even though the parties had supposed that a license under the patent of 1856 was necessary to enable them to use the invention that had been sold to them yet as that was not the case the error of the parties cannot control the effect of what is clear in the eye of the law.

III.—The agreement Exhibit E of 1868, and the agreement of April 10th, 1861 Exhibit A, have been fully considered in the former brief, and it is unnecessary to say anything further in regard to them.

All of which is respectfully submitted.

FREDERIC H. BETTS.

SUPREME COURT OF THE UNITED STATES.

No. 302.

J. SHERMAN HALL AND WILLIAM J. POPE, PLAINTIFFS IN ERROR,

vs.

JOHN WEARE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, before the Hon. Henry W. Blodgett, judge of the district court of the United States for said district, and on Tuesday, the tenth day of June, A. D. one thousand eight hundred and seventy-three, and of the Independence of the United States the 97th year,

W. H. BRADLEY, *Clerk.*

JOHN WEARE
v.
J. SHERMAN HALL & WILLIAM J. POPE. } Assumpsit.

Be it remembered that on the fifteenth day of November, A. D. 1872. the complainant, by Dent & Black, his attorneys, filed the following notice in the office of the clerk of the circuit court of the United States for the northern district of Illinois, to restore the declaration destroyed
2 by the fire on the ninth day of October, eighteen hundred and seventy-one; which notice is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court.

JOHN WEARE
v.
SERHMAN HALL & POPE.

1ST NAT'L BANK OF CEDAR RAPIDS, IOWA,
v.
SHERMAN HALL & POPE.

To said defendants or John N. Jewett, esq., their attorney:

Please take notice that at the opening of said court to-morrow morning, the 15th instant, or as soon thereafter as the matter can be heard we shall ask leave of the court to file a substantial copy of the declaration in the above-entitled suits in place of those destroyed, and for a rule on the defendants to plead to the same in ten days, respectively.

DENT & BLACK,
Plffs. Attys.

CHICAGO, *Nov.* 14, 1872.

3 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

John H. Batten, jr., being duly sworn, on oath says: Served the within notice on the within-named J. Sherman Hall by leaving a copy thereof with him this 14th day of November, A. D. 1872.

JOHN H. BATTEN, JR.

Subscribed and sworn to before me this 14th day of November, A. D. 1872.

E. A. DRUMMOND,
U. S. Com.

STATE OF ILLINOIS,
County of Cook, ss:

John H. Batten, jr., being duly sworn, on oath says that he served

the within notice on the within-named Wm. J. Pope by delivering a copy thereof to him this 14th day of November, A. D. 1872. Deponent served the notice on J. S. Hall and William J. Pope, as aforesaid, after having first called upon J. N. Jewett, the attorney, who referred deponent to said defendants, he not wishing to accept service, whereupon deponent served said notice on said J. Sherman Hall and William J. Pope.

JOHN H. BATTEN, JR.

4 Subscribed & sworn to before me this 14th day of November, A. D. 1872.

[SEAL.] HENRY B. EASTMAN,
Notary Public.

(Endorsed:) Filed Nov. 15, 1872. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 15th day of November, A. D. 1872, in the record of proceedings of said court on that day appeared the following entry, to wit:

JOHN WEARE
v.
J. SHERMAN HALL AND WILLIAM J. POPE. } Assumpsit.

On motion of the plaintiff, by his attorney, leave is given him to file in place of the original declaration heretofore filed herein, destroyed by fire on the ninth day of October, eighteen hundred and seventy-one, a copy of the same, and it is ordered that said copy be substituted for and have the same effect as the original, and thereupon the de-
5 fendants are hereby ruled to plead to said declaration in ten days.

And thereupon the said plaintiff files a bond for costs, and also said declaration; which reads in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1872.

JOHN WEARE
v.
J. SHERMAN HALL AND WILLIAM J. POPE, partners, &c., firm-name Sherman Hall & Pope. } In assumpsit.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 15th day of November, A. D. 1872.

DENT & BLACK.

Filed November 15, 1872. Wm. H. Bradley, clerk.

6 *Copy of declaration filed by leave of court.*

United States circuit court, to the May term, A. D. 1869.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

John Weare, plaintiff in this suit, who is a citizen of the State of Iowa, by Dent & Black, his attorneys, complains of J. Sherman Hall and William J. Pope, partners under the firm-name of Sherman Hall & Pope, and citizens of the State of Illinois, defendants, in a plea of trespass on the case upon promises. For that whereas heretofore, to wit, on the 1st day of March, A. D. 1869, at Cedar Rapids, Iowa, to wit, at the district aforesaid, Charles H. Hall, by the name & style of C. H. Hall, made his certain bill of exchange in writing, bearing date a certain day & year therein mentioned, to wit, the day and year aforesaid, and thereby then and thereby requested the defendants, under
7 their firm-name of Sherman Hall & Pope, fifteen days after the date thereof, to pay to the plaintiff, under the name and style of John Weare, cashier, the sum of twenty-five hundred dollars, and then and there delivered the said bill of exchange to the plaintiff, which said bill of exchange the defendants, by their said firm-name of Sherman Hall & Pope, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, upon sight thereof, accepted. And the plaintiff avers that afterwards, and when the said bill of exchange became due & payable according to the tenor and effect thereof, to wit, on the 18th day of March, A. D. 1869, at the district aforesaid, the said bill of exchange was duly presented for payment thereof, & payment of the said sum of money was then and there duly required; but the defendants, nor any person on their behalf, did or would, when the said bill was so presented & shown for payment as aforesaid, or at any time before or afterwards, pay the said sum of money in said bill specified, or any part thereof, but then and there wholly neglected and refused: of all which said several premises the defendants afterwards, to wit, on the day & year last aforesaid, at the said district, had notice, by means whereof the
8 defendants then & there became liable to pay to the plaintiff the said sum of money in said bill of exchange specified when the defendants should be thereunto afterwards requested; and being so liable, they, the defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, promised the plaintiff to pay him the said sum of money in said bill of exchange specified, when they, the defendants, should be thereunto afterwards requested. And, also, for that whereas heretofore, to wit, on the 5th day of March, A. D. 1869, at Cedar Rapids, Iowa, to wit, at the district aforesaid, Charles H. Hall, by the name & style of C. H. Hall, made his certain other bill of exchange in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then & there requested the defendants, under their firm-name of Sherman Hall & Pope, ten days after the date thereof, to pay to the plaintiff, under the name and style of John Weare, cashier, the sum of two thousand dollars, and then and there delivered the said bill of exchange to the plaintiff, which said bill of exchange the defendants, by their
9 said firm-name of Sherman Hall & Pope, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, upon sight thereof, accepted. And the plaintiff avers that afterwards, and when the said bill of exchange became due & payable according to the tenor

and effect thereof, to wit, on the 18th day of March, A. D. 1869, at the district aforesaid, the said bill of exchange was duly presented for payment thereof, & payment of the said sum of money was then & there duly required; but the defendants, nor any person on their behalf, did or would, when the said bill was so presented & shown for payment as aforesaid, or at any time before or afterwards, pay the said sum of money in said bill specified, or any part thereof, but then and there wholly neglected and refused so to do; of all which said several premises the defendants afterwards, to wit, on the day and year last aforesaid, at the said district, had notice; by means whereof the defendants then & there became liable to pay to the plaintiff the said sum of money in said bill of exchange specified, when the defendants should be thereunto afterwards requested; and being so liable, they, the defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, promised the plaintiff to pay him the said sum of money in said bill of exchange specified, when they, the defendants, should be thereunto afterwards requested.

And whereas also the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, were indebted to said plaintiff in the further sum of forty-five hundred dollars, of like lawful money aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendants and at the like request of said defendants, and for other money by the said plaintiff before that time, paid, laid out, and expended for the said defendants, and at the like request of said defendants, and for other money by the said defendants before that time had and received to and for the use of said plaintiff; and, also, in the further sum of forty-five hundred dollars, for so much money before that time and then due and payable from the said defendants to the said plaintiff for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendants to the said plaintiff, and by the said plaintiff forborne to the said defendants for divers long spaces of time before then elapsed, at the like special instance and request of the said defendants. And, being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrears and unpaid, and upon such accounting the said defendants then and there were found to be in arrears and indebted to the said plaintiff in the further sum of forty-five hundred dollars of like lawful money as aforesaid. And being so found in arrears and indebted to said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truely to pay unto the said plaintiff the said sum of money last mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless, the said defendants (although often requested, etc.,) have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay

the same or any part thereof, to the said plaintiff, the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiff of ten thousand dollars; and therefore the said plaintiff brings suit, etc.

By DENT & BLACK,
Plff's Attys.

Copy of instrument sued on.

[Stamp. $1.25.]

$2,500. CEDAR RAPIDS, IOWA, *March* 1, 1869.

Fifteen days after date pay to the order of John Weare, cashier, twenty-five hundred dollars.

(Signed) C. H. HALL.

To SHERMAN HALL & POPE, *Chicago.*

13 $2,000. CEDAR RAPIDS, IOWA, *March* 5, 1869.

[Stamp. 100.]

Ten days after date pay to the order of John Weare, cashier, two thousand dollars.

(Signed) C. H. HALL.

To SHERMAN HALL & POPE, *Chicago.*

Each of the bills of exchange was endorsed:

"Accepted.

"SHERMAN HALL & POPE.
"GOOCH."

Sherman Hall & Pope to John Weare, cashier, Dr.

To money lent and advanced	$10,000
To money paid, laid out, and expended	10,000
To money had and received	10,000
To interest due	500

UNITED STATES OF AMERICA,
No'thern District of Illinois, ss:

Wm. P. Black, being duly sworn, on oath says that he is a member of the firm of Dent & Black, attorneys for the plaintiff in the case of John Weare vs. Sherman Hall & Pope, & knows of the bringing of action by said plaintiff against said defendants. Said action was brought in the United States circuit court for the northern
14 district of Illinois, on or about the 26th day of April, 1869, and a declaration was duly filed therein, of which affiant believes the foregoing to be a substantially correct copy; that the files in said cause and all copies thereof in possession of affiant's firm, together with the original bills of exchange upon which said action was brought, and which were in possession of affiant's firm, were destroyed in the great conflagration of Oct. 8th & 9th, 1871; that the defendants duly plead to said action a plea of the general issue, and also a plea of set-off of a certain draft or bill of exchange of $4,500, drawn by the 1st National Bank of Cedar Rapids, Iowa, in favor of C. H. Hall, and by said Hall indorsed and delivered to said defendants, to which said plea of the general issue plaintiff filed a general replication, and to said special plea filed by defendants plaintiff filed a special replication, setting up

fraud in the obtaining of said draft or bill of exchange for $4,500 on the part of said C. H. Hall, and knowledge of such fraud by said defendants at the time of their receiving the same; and to said
15 replication of the plaintiff the defendants filed a general rejoinder.

W. P. BLACK.

Subscribed and sworn to before me this 13th day of November, A. D. 1872.

Filed Nov. 15, 1872. Wm. H. Bradley, clk.

16 And thereupon, on the 24th day of December, A. D. 1872, the defendants, by their attorneys, filed their pleas to said declaration, in the words and figures following, to wit:

Circuit court U. S., northern dist. of Illinois.

J. SHERMAN HALL & WILLIAM J. POPE
ads.
JOHN WEARE.

And the said defendants, by E. A. Storrs and Sleeper & Whilton, their attorneys, come and defend the wrong & injury when, &c., and say that they did not undertake or promise in manner and form as the said plaintiff hath above thereof in complaining declared against them, and the said plaintiff doth the like, &c.

And for a further plea in this behalf, by leave of the court here
17 first had and obtained, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because, they say, that the said plaintiff heretofore, to wit, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, at Cedar Rapids, in the State of Iowa, to wit, at Chicago, in the said northern district of Illinois, made his certain draft or bill of exchange, in writing, bearing date on a day certain therein mentioned, to wit, on the day and year last aforesaid, and signed the same with his own proper hand, and with the addition thereto of the word "cashier," and directed the same to the Third National Bank of Chiago, in the State of Illinois, and therein and thereby, for value received, directed the said The Third National Bank of Chicago, upon sight of the said bill of exchange, to pay to the order of C. H. Hall the sum of four thousand and five hundred dollars, and then and there delivered the same to the said C. H. Hall; and thereupon the said C. H. Hall, afterwards, to wit, on the same day and year aforesaid, at Cedar Rapids, aforesaid, to wit, at Chicago aforesaid, endorsed the said bill of
18 exchange to the said defendants, and then and there delivered the same to them, and did thereby then and there order and direct the said sum of money in the said bill of exchange mentioned to be paid to the said defendants, and which said bill of exchange was afterwards, to wit, on the same day and year last aforesaid, to wit, at the city of Chicago aforesaid, presented and shown to the said The Third National Bank of Chicago for payment, and payment thereof demanded; but the said The Third National Bank of Chicago then and there neglected and refused to pay the said sum of money in the said bill of exchange specified, whereof the said plaintiff afterwards, to wit, on the day and year last aforesaid, to wit, at Chicago, to wit, at Cedar Rapids aforesaid, had due notice; and the said defendants aver that the said bill of exchange was afterwards, to wit, on the day and year last aforesaid, to wit, at

Chicago aforesaid, duly protested for non-payment thereof, of which the said plaintiff also had due notice, to wit, on the day and at the place aforesaid; and the said defendants further aver that the costs and charges of said protest amounted to a large sum of money, to wit,
19 to the sum of five dollars, which sum was paid out and expended therefor by these defendants, whereby and by means whereof, and by force of the statute in such case made and provided, the said plaintiff became and was liable to pay to the said defendants the said sum of money in the said bill of exchange mentioned, and the said costs of protest, and the interest on the said sum of money in the said bill of exchange specified until the same was paid, and five per cent. damages on the said sum of money; and being so liable, and in consideration thereof, he, the said plaintiff, afterwards, to wit, on the day and year aforesaid, and at the place aforesaid, undertook and promised the said defendants to pay to them said sum of money and the interest thereon and the said five per cent. damages and the said costs and charges of protest, but has hitherto neglected & refused so to do, and still refuses so to do; wherefore the said several sums of money now remain due and owing from the said plaintiff to the said defendants; and the said defendants will set off and allow to the said plaintiff on the trial of this cause so much of the said several sums of money
20 so due and owing from the said plaintiff to the said defendants against any demand of the said plaintiff to be proved on the said trial as will be sufficient to satisfy and discharge such demand according to the statute in such case made and provided, and have the balance certified in their favor; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof, against them, &c.

And for a further plea in this behalf, by leave of the court first had and obtained, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because, they say, that the said plaintiff on the said first day of March and the said fifth day of March, one thousand eight hundred and sixty-nine, was the cashier of the First National Bank of Cedar Rapids, in the State of Iowa, and continued to be such cashier from thence to the time of the commencement of this suit; that the said bills of exchange in the said declaration mentioned were delivered by the said Charles H. Hall
21 to the said plaintiff, as such cashier, for the said The First National Bank of Cedar Rapids, and the said bank then and there became and was the legal owner and holder thereof, and of each of the said bills of exchange, and so continued to be such legal owner and holder of said bills of exchange, and of each of them, from the date of each until the commencement of this suit.

And the said defendants further say that the said The First National Bank of Cedar Rapids afterwards, to wit, on the sixteenth day of March, one thousand eight hundred and sixty-nine, at Cedar Rapids aforesaid, to wit, at Chicago aforesaid, made its certain bill of exchange in writing, bearing date on a day certain therein mentioned, to wit, the day and year last aforesaid, and directed the same to the Third National Bank of Chicago, in the State of Illinois, and then and there delivered the same to the said Charles H. Hall, wherein and whereby the said The First National Bank of Cedar Rapids directed the said The Third National Bank of Chicago to pay to the order of said Charles H. Hall, by the name and description of C. H. Hall, the sum of four thousand dollars upon sight of said bill of exchange, which said bill of exchange
22 the said Charles H. Hall afterwards, to wit, on the day and year

and at the place last aforesaid, endorsed, and then and there delivered the same to the said plaintiff, and then and there thereby appointed and directed the said sum of money in the said bill of exchange specified to be paid to the said defendants, and which said bill of exchange afterwards, to wit, on the same day and year, to wit, at the said city of Chicago, was presented to the said The Third National Bank of Chicago for payment, and payment thereof demanded; but the said The Third National Bank of Chicago then and there neglected and refused to pay the said sum of money in the said bill of exchange specified, and the said bill of exchange was then and there, to wit, on the day and year last aforesaid, duly protested for non-payment thereof, of which non-payment and protest the said The First National Bank of Cedar Rapids afterwards, to wit, on the day and year last aforesaid, at Cedar Rapids aforesaid, had due notice.

And the said defendants aver that the costs and charges of said protest were paid by them, and amounted to a large sum of money,
23 to wit, the sum of five dollars, and that by means of the premises, and by force of the statute in such case made and provided, the said The First National Bank of Cedar Rapids became and were liable to pay to the said defendants the said sum of four thousand and five hundred dollars in the said bill of exchange specified, and damages thereon at the rate of five per cent. upon said sum of money, and said costs and charges of said protest, and interest on said sum of forty-five hundred dollars until the same was paid, which said several sums of money amount in the whole to a large sum of money, to wit, to the sum of five thousand dollars; and that the said The First National Bank of Cedar Rapids, while it was so the legal holder and owner of the said two bills of exchang' in the said declaration mentioned, became and was indebted to the said defendants in the said several sums of money, and at the commencement of this suit was, and still is, indebted to the said defendants by reason of the premises in a large sum of money, to wit, the said sum of five thousand dollars, of all which the said plaintiff had due notice; and the said defendants will set off and allow
24 to the said plaintiff, on the trial of this action, so much of the said sum of money so due and owing to them from the said bank against the said sums of money specified in the said two bills of exchange in the said declaration mentioned as will be sufficient to satisfy and discharge the same in full, and have the balance certified in their favor, according to the statute in such case made and provided; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

E. A. STORRS,
SLEEPER & WHITON,
Defts.' Attys.

Filed Dec. 24, 1872. Wm. H. Bradley, clk.

25 And afterwards, to wit, on the 14th day of January, A. D. 1873, in the records of the proceedings of said court in said cause is the following entry, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL. } Assumpsit.

On motion of the plaintiff, by his attorney, leave is given him to reply double to the pleas herein.

26 And thereupon, on the third day of February, A. D. 1873, the said plaintiff, by Dent and Black, his attorneys filed in the office of the clerk of said court their amended replications, to wit:

27 Circuit court of the United States, northern district of Illinois.

JOHN WEARE
vs.
J. SHERMAN HALL AND WILLIAM J. POPE, partners, &c. } Assumpsit.

And the said plaintiff, for replication to the second plea by the said defendants pleaded, says that he, the plaintiff, ought not, by anything in said plea contained, to be barred from having or maintaining his action aforesaid, because, he says, that the bill of exchange in the said plea specified & proposed to be set off, was obtained by fraud, covin, & misrepresentation, in this, to wit, that at the time & place in
28 said plea mentioned Charles H. Hall, in order to induce the plaintiff to issue to said C. H. Hall said bill of exchange, falsely & fraudulently represented & stated to the plaintiff that certain bills of exchange before then drawn by said C. H. Hall in favor of the plaintiff on said defendants, & which the said C. H. Hall had before then procured to be discounted by the plaintiff upon the faith on the part of the plaintiff that the same would be accepted by said defendants, and which said bills amounted to a large sum, to wit, $11,000, and which bills of exchange said plaintiff had before then forwarded to Chicago for presentation to & acceptance by said defendants, had before then been accepted by said defendants, and that collateral securities for the payment thereof, as the plaintiff had required as a condition of any further discount by the plaintiff of any draft of said C. H. Hall on said defendants, had been by said defendants deposited with L. V. Parsons, cashier of the Third National Bank of Chicago, at Chicago, to his (said Parsons') satisfaction, and the said C. H. Hall then & there, well knowing that the said bills of exchange had not been accepted, nor said securities deposited by said defendants, but contriving & intending to
29 wrong, deceive, and defraud said plaintiff; and plaintiff avers that, relying upon said representations of said C. H. Hall, and upon the good faith and truth of said representations that said defendants had accepted said bills of exchange as before then drawn on them by said C. H. Hall, and had deposited securities therefor to the satisfaction of said L. V. Parsons aforesaid, & upon no other consideration whatever, said plaintiff executed and delivered to said C. H. Hall the bill of exchange in said plea mentioned.

And the plaintiff further avers that said pretences & representations of said C. H. Hall were, each and every thereof, false and fraudulent, and made with intent to deceive & mislead and defraud said plaintiff; that said defendants, as said C. H. Hall then and there well knew, had not accepted, and did not, nor would, on presentation thereof, accept or pay said bills of exchange so before then drawn on them by said C. H. Hall as aforesaid, and did not, nor would, deposit with said L. V. Parsons or any other person any collateral security for said bills so before then drawn on them.

And plaintiff further avers that said bills of exchange before then so drawn on said defendants by said C. H. Hall as aforesaid, and
30 every thereof, remain and still are wholly due and payable to the plaintiff, and the said C. H. Hall, though often requested, has not

paid said several bills, nor any of them, nor any part thereof; and the said defendants have hitherto wholly neglected and refused, and still do refuse, to accept or pay said several bills of exchange so drawn on them as aforesaid, or any of them, or any part thereof, or to deposit any securities therefor as aforesaid; by reason whereof the plaintiff hath lost large sums of money in excess of said supposed bill of exchange in said plea mentioned, to wit, $16,000.00.

And the plaintiff further avers that at the time the said defendants received the supposed bill of exchange in said plea mentioned they had notice and knowledge of the frauds, misrepresentation, and covin of said C. H. Hall in the premises, and plaintiff avers that the said defendants combined and confederated with the said C. H. Hall in the premises, and received from said C. H. Hall the said bill of exchange in bad faith as against the plaintiff, and with knowledge of the premises aforesaid, and paid him, said C. H. Hall, no consideration therefor, and
31 that, in further pursuance of the said conspiracy and combination between said defendants and said C. H. Hall to cheat, wrong, and defraud the plaintiff, the defendants then and there confederated with said C. H. Hall to cause the property of said C. H. Hall to be disposed of by him to a large amount, to wit, $10,000.00, in the interest of said defendants and in fraud of the rights of the plaintiff; and this the plaintiff is ready to verify. Wherefore he prays judgment, &c.

By DENT & BLACK,
Plff's. Attys.

And the said plaintiff, for further replication to the second plea by the said defendants pleaded, by leave of the court first had and obtained, says that he, the plaintiff, ought not by anything in said plea contained to be barred from having or maintaining his action aforesaid, because, he says, the consideration upon which the bill of exchange in the said plea specified and proposed to be set off was obtained has failed in this, to wit, that the sole and only consideration of the issuing of said bill of exchange in said plea mentioned was as follows,
32 to wit, that at the time and place of drawing of said supposed bill of exchange Charles H. Hall, by the name and style of C. H. Hall, drew upon said defendants his certain bill of exchange in substance as follows, to wit:

$5,000.00.] CEDAR RAPIDS, IOWA, *March* 16, 1869.

Fifteen days after date, pay to the order of John Weare, cashier, five thousand dollars.

C. H. HALL.

To SHERMAN HALL & POPE,
Chicago.

And then and there presented said bill of exchange to the plaintiff for discount; and then and there, in order to induce the plaintiff to discount said bill of exchange above set forth, and to issue to said C. H. Hall the bill of exchange in said plea mentioned, falsely and fraudulently represented and stated to the plaintiff that certain bills of exchange before then drawn by said C. H. Hall in favor of the plaintiff on said defendants, and which the said C. H. Hall had before then procured to be discounted by said plaintiff upon the faith on the part
33 of the plaintiff that the same would be accepted by said defendants, which said bills amounted to a large sum, to wit, $11,000.00, and which bills of exchange said plaintiff had before then forwarded to

Chicago, for presentation to and acceptance by said defendants, had before then been accepted by said defendants, and that collateral securities for the payment thereof, which the plaintiff had required as a condition of any further discount by the plaintiff of any drafts of said C. H. Hall on said defendants, had been by said defendants deposited with L. V. Parsons, to his (said Parsons')'satisfaction, he, the said C. H. Hall, then and there well knowing that said bills of exchange had not been accepted, nor said securities deposited by defendants, but contriving and intending to wrong & defraud said plaintiff; and, further to deceive and mislead the plaintiff, said C. H. Hall then and there represented to the plaintiff that said defendants would accept and pay said bill of exchange then and there so drawn as aforesaid on said defendants by said C. H. Hall, and would deposit collateral securities to such acceptance with said L. V. Parsons, to his (said Parsons') satisfaction, above set forth, the said
34 C. H. Hall then and there well knowing that said defendants did not intend to, and would not accept, secure, or pay said bill of exchange so then and there drawn as aforesaid.

And plaintiff avers that, relying on said promises, representations, and undertakings of said C. H. Hall, and upon the good faith of said representations that said defendants had accepted said bills of exchange so before then drawn on them by said C. H. Hall, and had deposited securities therefor to the satisfaction of said L. V. Parsons aforesaid, and that the said defendants would accept and pay said bill of exchange then and there drawn on them by said C. H. Hall as aforesaid, and upon no other consideration whatever, said plaintiff received and discounted said bill of exchange in this replication first mentioned, so then and there drawn by said C. H. Hall on said defendants, and as a part of the proceeds thereof executed and delivered to the said C. H. Hall the bill of exchange in said plea mentioned.

And the plaintiff further avers that said pretences, representations, and promises of said C. H. Hall were each and every thereof
35 false and fraudulent, and made with intent to deceive, mislead, and defraud said plaintiff; that said defendants, as said C. H. Hall then and there well knew, had not accepted, and did not nor would, on presentation thereof, accept or pay said bills of exchange so before then drawn on them by said C. H. Hall as aforesaid, and did not nor would deposit with said L. V. Parsons, or any other person, any collateral security for the bills before then so drawn on them, and did not nor would, on presentation thereof, accept, secure, or pay said bill of exchange so then and there drawn on them by said C. H. Hall, and first in this replication mentioned, although the same was, after the drawing thereof, to wit, on the 17th day of March, 1869, duly presented and shown to said defendants for acceptance, which was then and there refused, and said bill was then and there duly protested, whereof the said C. H. Hall was then and there duly notified.

And plaintiff further avers that said bills of exchange before then so drawn on said defendants by said C. H. Hall as aforesaid, and every thereof, and said bill of exchange, first in this replication men-
36 tioned, so then and there drawn by said C. H. Hall on said defendants, remain and still are wholly due and payable to the plaintiff; and the said C. H. Hall, though often requested, has not paid said several bills, nor any part thereof, but so to do has hitherto wholly neglected and refused, and still does refuse; and the said defendants have hitherto wholly neglected and refused, and still do refuse to accept or pay said several bills of exchange so drawn upon them by said C. H. Hall or any thereof, or to deposit any securities therefor as aforesaid, by reason

whereof the plaintiff hath lost large sums of money in excess of said supposed bill of exchange in said plea mentioned, to wit, $16,000.00.

And plaintiff further aver' that, at the time the said defendants received the supposed bill of exchange in said plea mentioned, they had notice and knowledge of the fraud, misrepresentation, and covin of said C. H. Hall in the premises, and of the consideration upon which said bill of exchange, in said plea mentioned and proposed to be set off, was drawn and executed by the plaintiff; and that the said
37 defendants combined and confederated with the said C. H. Hall in the premises, and received from C. H. Hall the said bill of exchange in said plea mentioned, in bad faith as against the plaintiff, and with knowledge of the premises aforesaid, and paid him, said C. H. Hall, no consideration therefor.

And the plaintiff further avers that said bill of exchange, in this replication first mentioned, was heretofore, to wit, on the 9th day of October, 1871, at Chicago aforesaid, by casualty and without the fault of the plaintiff, lost and destroyed by fire.

And this the plaintiff is ready to verify. Wherefore he prays judgment, &c.

By DENT & BLACK,
Plaintiffs' Attys.

And the plaintiff, for replication to the third plea of the defendants, says precludi non, &c., because he says that the bills of exchange in the declaration mentioned are held by him, and this suit is prosecuted by him in behalf of the First National Bank of Cedar Rapids, Iowa; and that the supposed bill of exchange in said plea mentioned was
38 drawn by said plaintiff for and in behalf of said bank, and was obtained by fraud, covin, and misrepresentation in this, to wit, that, at the time and place in said plea mentioned, Charles H. Hall, in order to induce the said bank to issue to said C. H. Hall said bill of exchange, falsely and fraudulently represented and stated to the plaintiff, acting for and on behalf of said bank, that certain bills of exchange before then drawn by said C. H. Hall in favor of the plaintiff, as cashier of said bank, on said defendants, and which bills of exchange were then and there the property of said bank, and which the said C. H. Hall had before then procured to be discounted by said bank upon the faith, on the part of said bank, that the same would be accepted by said defendants, and which bills amounted to a large sum, to wit, $11,000.00, and which bills of exchange said bank had before then forwarded to Chicago for presentation to, and acceptance by, said defendants, had before then been accepted by said defendants, and that collateral securities for the payment thereof, as said bank had required as a condition of any
39 further discount of any draft of said C. H. Hall on said defend ants, had been by said defendants deposited with L. V. Parsons, cashier of the Third National Bank of Chicago, at Chicago, to his, said Parsons', satisfaction, he, the said C. H. Hall, then and there well knowing that the said bill of exchange had not been accepted, nor said securities deposited by said defendants, but contriving and intending to wrong, deceive, and defraud said bank. And plaintiff avers that, relying upon said representations of said C. H. Hall and upon the good faith and truth of said representations that said defendants had accepted said bills of exchange so before then drawn upon them by said C. H. Hall, and had deposited securities therefor to the satisfaction of said L. V. Parsons as aforesaid, said bank executed and delivered to said C. H. Hall the bill of exchange in said plea mentioned.

And the plaintiff further avers that said pretences and representations of said C. H. Hall were, each and every thereof, false and fraudulent, and made with intent to deceive, mislead, and defraud said bank; that said defendants, as said C. H. Hall then and there well knew,
40 had not accepted, nor did not, nor would, on presentation thereof, accept or pay said bills of exchange so before then drawn on them by said C. H. Hall as aforesaid, and did not, nor would deposit with said L. V. Parsons, or any other person, any collateral security for said bills so before then drawn on them. And plaintiff further avers that said bills of exchange before then so drawn on said defendants by said C. H. Hall as aforesaid, and every thereof, remain and still are wholly due and payable to said bank; and the said C. H. Hall, though often requested, has not paid said several bills, or any of them, or any part thereof, and the said defendants have hitherto wholly neglected and refused, and still do refuse to accept or pay said several bills of exchange so drawn upon them by said C. H. Hall, or any thereof, or to deposit any securities therefor as aforesaid; by reason whereof the said bank hath lost large sums of money in excess of said supposed bill of exchange in said plea mentioned, to wit, $16,000.00. And plaintiff further avers that, at the time the said defendants received the supposed bill of exchange in said plea
41 mentioned, and proposed to be set off, they had notice and knowledge of the fraud, misrepresentation, and covin of said C. H. Hall in the premises, and of the consideration upon which said supposed bill of exchange in said plea mentioned and proposed to be set off was drawn and executed by said bank. And plaintiff avers that the defendants combined and confederated with the said C. H. Hall in the premises, and received from said C. H. Hall the said supposed bill of exchange in said plea mentioned in bad faith as against the said bank, and with knowledge of the premises aforesaid, and paid him, said C. H. Hall, no consideration therefor; and that, in further pursuance of the said conspiracy and combination of said defendants and said C. H. Hall to cheat, wrong, and defraud the plaintiff, the defendants then and there confederated with said C. H. Hall to cause the property of said C. H. Hall to be disposed of by him to a large amount, to wit, $10,000.00, in the interest of said defendants and in fraud of the rights of said bank in the premises.

And this the plaintiff is ready to verify. Wherefore he prays judgment, &c.

By DENT & BLACK,
Plaintiffs' Attys.

42 And the said plaintiff, for further replication to the third plea by the said defendants, pleaded by leave of the court first had and obtained, says, precludi non, &c., because he says that the bills of exchange in the declaration mentioned are held by him, and this suit is prosecuted by him for and in behalf of the First National Bank of Cedar Rapids, Iowa, and that the consideration upon which the supposed bill of exchange, in said plea specified and proposed to be set off was obtained has failed in this, to wit, that the sole and only consideration of the issuing of said supposed bill of exchange in said plea specified was as follows, to wit, that at the time and place of the drawing of said supposed bill of exchange, Charles H. Hall, by the name and style of C. H. Hall, drew upon the defendants his certain bill of exchange in substance as follows, to wit:

$5,000.00.] CEDAR RAPIDS, IOWA, *March* 16, 1869.

Fifteen days after date pay to the order of John Weare, cashier, five thousand dollars.

C. H. HALL.

To SHERMAN HALL & POPE, *Chicago.*

And then and there presented said bill of exchange to said
43 bank for discount, and then and there, in order to induce the said bank to discount said bills of exchange above set forth, and to issue to said C. H. Hall the supposed bill of exchange in said plea mentioned, falsely and fraudulently represented and stated to the plaintiff, acting for and on behalf of said bank, that certain bills of exchange before then drawn by said C. H. Hall in favor of said bank on said defendants, and which the said C. H. Hall had before then procured to be discounted by said bank upon the faith on the part of said bank that the same would be accepted by said defendants, which said bills amounted to a large sum, to wit, $11,000.00, and which bills of exchange said bank had before then forwarded to Chicago for presentation to and acceptance by said defendants, had before then been accepted by said defendants, and that collateral securities for the payment thereof, as said bank had required as a condition of any further discount by said bank of any further draft of said C. H. Hall on said defendants, had been by said defendants deposited with L. V. Parsons to his, said Parsons', satisfaction, he the said C. H. Hall then and there well knowing that said bills of exchange had not been accepted, nor said se-
44 curities deposited by said defendants, but contriving and intending to wrong and defraud said bank and further to deceive and mislead said bank, said C. H. Hall then and there represented to the plaintiff that said defendants would accept and pay said bill of exchange then and there so drawn as aforesaid on said defendants by said C. H. Hall, in this replication first mentioned, and would deposit collateral securities to such acceptance with said L. V. Parsons, to his, said Parsons', satisfaction, the said C. H. Hall then and there well knowing that said defendants did not intend to and would not accept, secure, or pay said bill of exchange so then and there drawn on them as aforesaid, and plaintiff avers that, relying upon said promises, representations, and undertakings of said C. H. Hall, and upon the good faith of said representations that said defendants had accepted said bills of exchange so before then drawn on them by said C. H. Hall, and had deposited securities there for the satisfaction of said L. V. Parsons as aforesaid, and that the said defendants would accept and pay said bill of exchange then and there drawn on them by said C. H. Hall, as aforesaid, and upon no other consideration whatever, said bank received
45 and discounted said bill of exchange in this replication first mentioned, so then and there drawn by said C. H. Hall on said defendants, and, as a part of the proceeds thereof, executed and delivered to the said C. H. Hall the bill of exchange in said plea mentioned.

And the plaintiff further avers that said pretences, representations, and promises of said C. H. Hall were each and every thereof false and fraudulent, and made with intent to deceive, mislead, and defraud said bank; that said defendants, as said C. H. Hall then and there well knew, had not accepted, and did not nor would, on presentation thereof, accept or pay said bills of exchange so before then drawn on them by said C. H. Hall as aforesaid, and did not nor would deposit with said L. V. Parsons, or any other person, any collateral security for the bills before then so drawn on them, and did not nor would, on

presentation thereof, accept, secure, or pay said bill of exchange so then and there drawn on them by said C. H. Hall, & first in this replication mentioned, although the same was after the drawing thereof, to wit, on the 17th day of March, 1869, duly presented and shown to said defendants for acceptance, which was then and there refused, and said bill was then and there duly protested, whereof the said C. H. Hall was then and there duly notified.

46 And plaintiff further avers that said bills of exchange before then so drawn on said defendants by said C. H. Hall as aforesaid, and every thereof, and said bill of exchange first in this replication mentioned so then and there drawn by said C. H. Hall on said defendants, remain and still are wholly due and payable to the plaintiff, and the said C. H. Hall, though often requested, has not paid said several bills, or any of them or any part thereof, but so to do has hitherto wholly neglected and refused and still does refuse, and the said defendants have hitherto wholly neglected and refused, and still do refuse, to accept or pay said several bills of exchange so drawn upon them by said C. H. Hall, or any thereof, or to deposit any securities therefor as aforesaid by reason whereof the said bank hath lost large sums of money in excess of said supposed bill of exchange in said plea mentioned, to wit, $16,000.00.

And plaintiff further avers that, at the time said defendants received the supposed bill of exchange in said plea mentioned, they had notice and knowledge of the fraud, misrepresentation, and covin of said C. H. Hall in the premises, and of the consideration upon which said bill of exchange in said plea mentioned and proposed to be set off was

47 drawn and executed by the said bank, and that the said defendants combined and confederated with the said C. H. Hall in the premises, and received from said C. H. Hall the said bill of exchange in said plea mentioned, in bad faith as against the said bank, and with knowledge of the premises aforesaid, and paid him, said C. H. Hall, no consideration therefor.

And the plaintiff further avers that said bill of exchange in this replication first mentioned was heretofore, to wit, on the 9th day of October, 1871, at Chicago aforesaid, by casualty and without the fault of said bank or of the plaintiff, lost and destroyed by fire.

And this the plaintiff is ready to verify; wherefore he prays judgment, &c.

By DENT & BLACK,
Plaintiffs' Attys.

Filed Feb'y 3rd, 1873. Wm. H. Bradley, clk.

48 And afterwards, to wit, on the fifth day of February, A. D. 1873, the said defendants by their attorneys come and file their rejoinder to said pleas, which reads in the words and figures following, to wit:

Circuit court U. S., northern district Ill.

J. SHERMAN HALL & WILLIAM J. POPE
ads.
JOHN WEARE.

And the said defendants as to the said replication of the said plaintiff by him firstly above replied to the said second plea of the said de-

fendants, say that, by reason of anything in that replication alleged, the said plaintiff ought not to have or maintain his aforesaid action thereof against him, nor ought they to be barred or precluded from having and maintaining their set-off in the said second plea mentioned, because they say that before the making and delivery of the said bill of ex-
49 change by the said plaintiff in that plea described, the said Charles H. Hall had drawn upon the said defendants divers and sundry bills of exchange payable at a day certain after the dates thereof respectively, and delivered the same to the said plaintiff, in and by which the said Charles H. Hall had ordered and directed the said defendants to pay to the said plaintiff the sums of money in said bills of exchange respectively mentioned, according to the tenor and effect of the said bills of exchange respectively, which said bills of exchange the said defendants, upon presentation thereof to them, accepted, to wit, at Chicago aforesaid, of which the said plaintiff had due notice.

And the said defendants aver that they, the said defendants, so accepted the said bills of exchange for the mere accommodation of the said Charles H. Hall and without any benefit or advantage or consideration whatever.

And before and at the said several times when the said defendants so accepted said several bills of exchange, he, the said Charles H. Hall, undertook and then and there promised the said defendants, in consideration that they would and did so accept the said bills of exchange for his accommodation as aforesaid, that he, the said Charles H. Hall,
50 would pay said several bills of exchange when they by their terms respectively became due and payable; and that on the said sixteenth day of March, A. D. 1869, the day of the date of said bill of exchange in the said second plea mentioned, there were outstanding and unpaid a large number of said bills of exchange, to wit, ten of such bills of exchange, and in the whole they amounted to a large sum of money, to wit, the sum of fifteen thousand dollars, of which said several bills of exchange, the said bills of exchange in the said declaration mentioned are a part. Of all which last-mentioned matters the said plaintiff had due notice, and well knew.

And the said defendants further aver that of the said several bills of exchange so as aforesaid accepted by the defendants as and for the mere accommodation of the said Charles H. Hall, there was one which, by the terms thereof, became due and payable at the City of Chicago on, to wit, the seventeenth day of March aforesaid, which the said plaintiff then and there, to wit, on the said sixteenth day of said March, had due notice and well knew, which said last-mentioned bill of exchange was for a certain sum of money therein named, to wit, the sum of
51 four thousand and five hundred dollars.

And the said defendants further aver that the said Charles H. Hall, in pursuance of his said promise and undertaking aforesaid with the said defendants to pay said bills of exchange so accepted by the said defendants for his accommodation, and in consideration of the liability of the said defendants aforesaid, and for the purpose of furnishing to the said defendants the means, and putting them in funds with which to meet and pay said bill of exchange so to become due and payable as aforesaid, to wit, on the said seventeenth day of March, of which the said plaintiff had due notice, and for a good and valuable consideration by him then and there given to the said plaintiff, and not for the cause or consideration, nor by the means in the said replication mentioned, obtained from the said plaintiff the said bill of exchange in the said second plea mentioned. And afterwards, to wit, on the day and year, and

at the place in the said second plea mentioned, and for the consideration aforesaid, endorsed and delivered the said bill of exchange to the said defendants, and the said defendants then and there received the said bill of exchange from the said Charles H. Hall, for a
52 good and valuable consideration, and in due and regular course of business, in the utmost good faith, and without any notice or knowledge of the said several matters in the said replication alleged, of all which the said plaintiff had due notice.

And the said defendants further aver that they did afterwards, to wit, on the said seventeenth day of March aforesaid, pay to the said plaintiff and discharge in full the said bill of exchange so by them accepted for the accommodation of the said Charles H. Hall, and which became due on the day last aforesaid, which the said plaintiff well knew.

And the said defendants further aver that the said plaintiff, well knowing the premises, but fraudulently intending and craftily and subtly contriving to injure and defraud the said defendants in that behalf, directed the said The Third National Bank of Chicago not to pay the said bill of exchange in the said plea mentioned to the said defendants, to wit, on the day and year last aforesaid, to wit, at Chicago aforesaid, and then and there fraudulently stopped payment thereof, to wit, at Chicago aforesaid, without that that the said bill of exchange in the said second plea mentioned was obtained by the said Charles H.
53 Hall by the said fraud, covin, or deceit, in the said first replication alleged. And this the said defendants are ready to verify. Wherefore they pray judgment that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them, and that they may have and be allowed their set-off in the said plea mentioned, &c.

And, for a further and second rejoinder to the said first replication to the said second plea, the said defendants, by leave of the court here first had and obtained, say that, by reason of anything in that replication alleged, the said plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred or precluded from having and maintaining their set-off in the said second plea mentioned, because they say that before the making and delivery of the said bill of exchange by the said plaintiff in that plea described, the said Charles H. Hall had drawn upon the said defendants divers and sundry bills of exchange payable at a day certain after the dates thereof, respectively, and delivered the same to the said plaintiff, in and by which the said Charles H. Hall had ordered and directed
54 the said defendants to pay to the said plaintiff the sums of money in said bills of exchange respectively mentioned, according to the tenor and effect of the said bills of exchange, respectively, which said bills of exchange the said defendants, upon presentation thereof to them, accepted, to wit, at Chicago aforesaid, of which the said plaintiff had due notice.

And the said defendants aver that they, the said defendants, so accepted the said bills of exchange for the mere accommodation of the said Charles H. Hall, and without any benefit or advantage or consideration whatever. And before, and at the said several times when the said defendants so accepted said several bills of exchange, he, the said Charles H. Hall, undertook, and then and there promised the said defendants, in consideration that they would and did so accept the said bills of exchange for his accommodation, as aforesaid, that he, the said

Charles H. Hall, would pay said several bills of exchange when they, by their terms, respectively, became due and payable.

And that on the said sixteenth day of March, A. D. 1869, the
55 day of the date of said bill of exchange in the said second plea mentioned, there were outstanding and unpaid a large number of said bills of exchange, to wit, ten of such bills of exchange; and in the whole they amounted to a large sum of money, to wit, the sum of fifteen thousand dollars, of which said several bills of exchange the said bills of exchange in the said declaration mentioned are a part; of all of which last-mentioned matters the said plaintiff had due notice, and well knew.

And the said defendants further aver that if the said several bills of exchange, so as aforesaid accepted by the said defendants as and for the mere accommodation of the said Charles H. Hall, there was one which by the terms thereof came due and payable at the city of Chicago on, to wit, the seventeenth day of March aforesaid, which the said plaintiff then and there, to wit, on the said sixteenth day of said March, had due notice and well knew, which said last-mentioned bill of exchange was for a certain sum of money therein named, to wit, the sum of four thousand and five hundred dollars.

And the said defendants further aver that the said Charles H.
56 Hall, in pursuance of his said promise and undertaking aforesaid with the said defendants, to pay said bills of exchange, so accepted by the said defendants for his accommodation, and in consideration of the liability of the said defendants aforesaid, and for the purpose of furnishing to the said defendants the means and putting them in funds with which to meet and pay said bill of exchange, so to become due and payable as aforesaid, to wit, on the said seventeenth day of March, of which the said plaintiff had due notice, and for a good and valuable consideration by him then and there given to the said plaintiff, and not for the cause or consideration nor by the means in the said replication mentioned, obtained from the said plaintiff the said bill of exchange in the said second plea mentioned. And afterwards, to wit, on the day and year and at the place in the said second plea mentioned, and for the consideration aforesaid, endorsed and delivered the said bill of exchange to the said defendants, and the said defendants then and there received the said bill of exchange from the said Charles H. Hall for a good and valuable consideration, and in the due and regular
57 course of business and in the utmost good faith, and without any notice or knowledge of the said several matters in the said replication alleged. Of all which the said plaintiff had due notice.

And the said defendants further aver that they did afterwards, to wit, on the said seventeenth day of March aforesaid, pay to the said plaintiff and discharge in full the said bill of exchange, so by them accepted for the accommodation of the said Charles H. Hall, and which became due on the day last aforesaid, which the said plaintiff well knew.

And the said defendants further aver that the said plaintiff, well knowing the premises, but fraudulently intending and craftily and subtly contriving to injure and defraud the said defendants in that behalf, directed the said The Third National Bank of Chicago not to pay the said bill of exchange in the said plea mentioned to the said defendants, to wit, on the day and year last aforesaid, to wit, at Chicago aforesaid, and then and there fraudulently stopped payment thereof, to wit, at Chicago aforesaid.

58 Without that, that the said defendants combined and confederated with the said Charles H. Hall, in the premises in the said

replication, or to cause the property of the said Charles H. Hall, or any of it, to be disposed of as in that replication alleged, and this the said defendants are ready to verify.

Wherefore they pray judgment, as in and by their said plea they have already prayed, &c.

And the said defendants, as to the said replication of the said plaintiff, by him secondly replied to the said second plea, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendants, nor ought they, the said defendants, to be barred or precluded from having and maintaining their set-off aforesaid, because they say that they, the said defendants, had before the sixteenth day of March, 1869, at the request of the said Charles H. Hall, and for his mere accommodation, accepted divers, to wit, ten bills of exchange drawn by the said Charles H. Hall on the said defendants for divers large sums of money, amounting in all, to wit, to the sum of fifteen thousand dollars, all drawn in favor of the said plaintiff, and
59 all due at a certain day after the date thereof, and all owned by the said plaintiff, of which the said bills of exchange in the said declaration mentioned are a part, and which said bills the said defendants had so accepted upon the promise and undertaking of the said Charles H. Hall, made to them and before the said times, respectively, when they so accepted the same, that he, the said Charles H. Hall, would, whenever any of the said bills became due and payable, pay the same, and keep and indemnify the said defendants from all liability thereon. All which was well known to the said plaintiff.

And the said defendants further aver that one of said bills of exchange for a large sum of money, to wit, the sum of forty-five hundred dollars, became and was due and payable on a day certain therein mentioned, to wit, the seventeenth day of March, A. D. 1869, at the city of Chicago aforesaid, and the said Charles H. Hall, on the said sixteenth day of March, A. D. 1869, at Cedar Rapids, Iowa, in pursuance of his said promise and undertaking to pay said bills of exchange when
60 they became due, and for the purpose of providing the said defendants with the means, money, or funds with which to pay said last-mentioned bill of exchange on the day when by its terms it became and was due and payable, of which the said defendants then and there had due notice, obtained from the said plaintiff the said bill of exchange in the said second plea mentioned, in good faith and for a good and valuable consideration, and without any fraud, covin, deceit, misrepresentation, or false statement, and afterwards, to wit, on the said sixteenth day of March, for a good and valuable consideration, endorsed and delivered the said bill of exchange to the said defendants, as in the said second plea alleged, of which the said plaintiff had due notice. And the said defendants then and there received the said bill of exchange from the said Charles H. Hall in good faith for a valuable consideration and in the due course of business, without any notice or knowledge of any of the said matters in the said replication alleged.

And the said defendants aver that they, the said defendants, afterwards, to wit, on the said seventeenth day of March, 1869, to
61 wit, at Chicago, paid the said bill of exchange so excepted by them for the accommodation of said Charles H. Hall, and which became due on that day to the plaintiff. But the said plaintiff, well knowing the premises, but craftily and subtly contriving and fraudulently intending to injure and deceive the said defendants in that behalf, directed the said The Third National Bank of Chicago not to accept or pay the said bill of exchange in the said second plea described

to the said defendants, and then and there fraudulently stopped the payment of said bill of exchange without that that the said defendants combined or confederated with the said Charles H. Hall in the premises in the said second replication mentioned in manner and form as therein alleged, and this the said defendants are ready to verify; wherefore they pray judgment as in and by their said second plea they have already prayed, &c.

And for a further rejoinder to the said second replication of the said plaintiff to the said second plea, by leave of the court here first had and obtained, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them,
62 nor ought they to be barred from having or maintaining their said set-off in the said plea mentioned, by reason of anything in that replication contained, because they say that they, the said defendants, before the said sixteenth day of March, 1869, had accepted drafts or bills of exchange drawn on them by the said Charles H. Hall in favor of the said plaintiff, which by their terms did not become due or payable until after the said sixteenth day of March, 1869, and which were then held and owned by the said plaintiff, and in the whole amounted to a large sum of money, to wit, the sum of twelve thousand dollars, and which said bills of exchange the said defendants had so accepted for the mere accommodation of the said Charles H. Hall, and the said Charles H. Hall had at and before the acceptance thereof undertaken and promised the said defendants to pay the same when by their terms they became due; of all which the said plaintiff had due notice and well knew.

And the said defendants in fact say that one of the said drafts or bills of exchange so accepted by them as aforesaid by its terms, afterwards, to wit, on the seventeenth day of March, 1869, became due and
63 payable, and *and* the said defendants afterwards, to wit, on that day, paid the same to the said plaintiff; that on the said sixteenth day of March, 1869, at Cedar Rapids, in the State of Iowa, the said Charles H. Hall, in pursuance of his promise and undertaking to pay said draft or bill of exchange at maturity, and for the purpose of giving to the said defendants the money and means with which to pay the same, without any knowledge, confederation, or combination with him by the said defendants as in said replication alleged, and for a good and valuable consideration, and in good faith, obtained the said bill of exchange from the said plaintiff, and then and there endorsed and delivered the same to the said defendants as in the said second plea alleged, of all which the said plaintiff then and there had due notice.

And the said defendants aver that they received the said bill of exchange in the said second plea mentioned in good faith, in the due and regular course of business, and upon a good and valuable consideration, without any notice or knowledge of any of the matters alleged in the said second replication, without that, that the said bill of exchange
64 was obtained by the said Charles H. Hall, by means of covin, fraud, deceit, and misrepresentation in the said replication alleged, in manner and form as the said plaintiff hath therein stated and alleged. And this the said defendants are ready to verify; wherefore they pray judgment as in and by their second plea they have already prayed, &c.

And as to the said replication of the said plaintiff by him firstly above replied to the said third plea of the said defendants, the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred from having and maintaining their said set-off in that plea mentioned by reason of anything in that replication contained, because they say that before

the said sixteenth day of March, 1869, they, the said defendants, had accepted divers bills of exchange drawn on them by the said Charles H. Hall, in favor of the said The First National Bank of Cedar Rapids, to a large amount, to wit, to the amount of twelve thousand dollars, for the mere accommodation of the said Charles H. Hall, and without any consideration, benefit, or advantage to them, which bills of ex-
65 change had not then by the terms thereof, nor had any of them, matured; all which matters and things were well known to the said bank, and to the said plaintiff then and there.

And the said defendants aver that the said Charles H. Hall, at and before the acceptance of the said bills of exchange, had undertaken and promised the said defendants that he would pay and discharge all of said bills of exchange as and when by the terms thereof respectively they became due and payable; that one of said bills of exchange for the sum of forty-five hundred dollars, afterward, to wit, on the 17th day of March, 1869, became due and payable at the city of Chicago aforesaid; and the said Charles H. Hall, in pursuance of his said promise and undertaking to pay the same when it became due, and for the purpose of giving to the said defendants the money and means to pay the same and discharge themselves from liability thereon as the acceptors thereof, obtained the said bill of exchange in said third plea mentioned from the said bank in good faith and for a good and valuable consideration, and without the fraud, covin, deceit, and misrepresentation in the said replication stated; and afterwards, to wit, on the same day
66 and year, at Cedar Rapids, to wit, at Chicago, endorsed and delivered the said bill of exchange to the said defendants, as in said third plea stated; all which matters and things the said plaintiff and said bank then and there well knew.

And the said defendants further aver that they received the said bill of exchange from the said Charles H. Hall in good faith, in the regular and due course of business, & for a good and valuable consideration, as the said plaintiff and said bank well knew; and afterwards, to wit, on the said seventeenth day of March, 1869, paid to the said bank the said bill of exchange so accepted by them, and which then, by its terms, became due. But the said bank, and the said plaintiff, fraudulently directed the said Third National Bank of Chicago not to pay said bill of exchange in the said third plea mentioned to the said defendants, and then and there fraudulently stopped payment of the said bill of exchange without that, that the said defendants conspired, combined, or confederated with the said Charles H. Hall in manner and form as the said plaintiff, in said replication, hath alleged. And this the said defendants are ready to verify. Wherefore they pray judgment as in
67 and by their said plea they have already prayed.

And for a further and second rejoinder to the said replication, the said defendants, by leave of the court, here first had and obtained, say that the said plaintiff, by reason of anything in that replication contained, ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred or precluded from having and maintaining their said set-off in said third plea mentioned, because they say that before the said sixteenth day of March, 1869, the said defendants had accepted for the said Charles H. Hall, and for his mere accommodation, and without any consideration, advantage, or benefit to the said defendants, a bill of exchange, drawn by him in favor of the said The First National Bank of Cedar Rapids, for a large sum of money, to wit, the sum of forty-five hundred dollars, which became due and payable by the terms thereof on a day certain after the date thereof, to wit, the seventeenth

day of March, 1869, and which said bill of exchange the said Charles H. Hall, when they so accepted the same, undertook and promised the said defendants to pay and discharge at the maturity thereof.

68 Of all which matters and things the said plaintiff and the said bank had notice, and well knew. And the said defendants further aver that the said Charles H. Hall, afterwards, to wit, on the sixteenth day of March, 1869, in pursuance of his said agreement to pay said bill of exchange, so accepted by the said defendants, and to place the said defendants in funds, and to give them the means to pay said bill of exchange and discharge their liability thereon, obtained from the said bank, in the due and regular course of business, and for a good and valuable consideration, and not upon the consideration in the said replication alleged, the said bill of exchange in the said third plea mentioned, and the said Charles H. Hall then and there endorsed the same to the said defendants, who received the same from the said Charles H. Hall in good faith, in the regular course of business, and for a good and valuable consideration, and without any combination or conspiracy between the said defendants and the said Charles H. Hall, and without any knowledge or notice of the said fraud, covin, deceit, or misrepresentation in the said replication alleged.

69 Without that, that the said bill of exchange was obtained by the said fraud, covin, deceit, or misrepresentation in the said replication, alleged in manner and form as the same is therein stated. And this the said defendants are ready to verify; wherefore they pray judgment as in and by their said third plea they have already prayed, &c.

And the said defendants as to the said replication of the said plaintiff, by him secondly above replied to, the said third plea, say that by reason of anything in that replication alleged the said plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred from having and maintaining their said set-off in the said third plea mentioned, because, they say, that before the said sixteenth day of March, 1869, they, the said defendants, had accepted, for the mere accommodation of the said Charles H. Hall, a bill of exchange, drawn by him on them, and payable to the said First National Bank of Cedar Rapids, at a day certain therein mentioned, to wit, the seventeenth day of March, 1869, at Chicago, aforesaid, for the sum of four thousand and five hundred dollars, which bill of exchange

70 the said Charles H. Hall, when the same was accepted, undertook and promised the said defendants to pay at maturity, all which the said bank and said plaintiff well knew. And the said defendants aver that the said Charles H. Hall, in pursuance of his said agreement, and for the purpose of putting the said defendants in funds and giving them the means to pay said bill of exchange and discharge their liability thereon, for a good and valuable consideration, in good faith and in the due and regular course of business, and not by means of the fraud, covin, deceit, and misrepresentation in the said replication alleged, obtained from the said bank the said bill of exchange in the said third plea mentioned, and then and there endorsed and delivered the same to the said defendants for a good and valuable consideration, and the said defendants then and there received the said bill of exchange from said Charles H. Hall in good faith, in the due and regular course of business, and without any knowledge or notice of the said fraud, covin, deceit, and misrepresentation in the said replication alleged, without that, that the said defendants conspired, combined, and confederated with the said Charles H. Hall, as in the said replication alleged and stated,

71 and this the said defendants are ready to verify; wherefore they pray judgment as in their said plea they have already prayed, &c.

And for a further and second rejoinder to the said second replication of the said plaintiff to the said third plea, the said defendants say that by reason of anything therein contained the said plaintiff ought not to have or maintain his aforesaid action thereof against them, nor ought they to be barred from having & maintaining their said set-off in that plea maintained, because, they say, that before the said sixteenth day of March, 1869, they had accepted another bill of exchange drawn by the said Charles H. Hall on them, and in favor of the said bank, for the sum of forty-five hundred dollars, and which, by its terms, became due on a day certain therein mentioned, to wit, on the seventeenth day of March, 1869, without any consideration, benefit, or advantage to them, but for the mere accommodation of the said Charles H. Hall, and which said bill of exchange the said Charles H. Hall undertook and promised said defendants to pay and discharge at maturity; all which the said bank and the said plaintiff well knew.

72 And the said defendants aver that on the said sixteenth day of March the said Charles H. Hall, for the purpose of putting the said defendants in funds, and giving them the means of paying said bill of exchange and to discharge their liability thereon in the due and regular course of business, and for a good and valuable consideration, and not by confederation or conspiracy or combination with the said defendants, obtained from said bank the said bill of exchange in the said third plea mentioned, and then and there, for a good and valuable consideration, endorsed and delivered the same to the said defendants, as in that plea alleged; and the said defendants then and there received the same in good faith in the due and regular course of business, and without any confederacy or combination with said Hall, and without any notice or knowledge of the fraud, covin, deceit, or misrepresentation alleged in said replication, which the said plaintiff and said bank well knew.

And the said defendants further aver that afterwards, to wit, on the said seventeenth day of March, they paid the said bill of exchange so accepted by them to the said bank, but the said bank and said

73 plaintiff directed the said Third National Bank of Chicago not to pay said bill of exchange in said third plea mentioned to the said defendants, and fraudulently stopped payment thereof. Without that, that the said bill of exchange in said third plea mentioned was obtained by fraud, covin, deceit, or misrepresentation, as in the said replication is above thereof supposed, and this the said defendants are ready to verify; wherefore they pray judgment, as in and by their said plea they have already prayed, &c.

E. A. STORRS &
SLEEPER WHITON,
Defts.' Attys.

Filed Feb. 5, 1873. Wm. H. Bradley, cl'k.

74 And afterwards, to wit, on the sixth day of February, A. D. 1873, the said plaintiff, by his attorneys, come and file in the office of the clerk of said court their surrejoinder and stipulation, which reads in the words and figures following, to wit:

United States circuit court, northern district of Illinois.

JOHN WEARE
v.
J. SHERMAN HALL AND WILLIAM J. POPE, partners, &c. } Assumpsit.

And the said plaintiff, as to the said several rejoinders of the said

defendants to the said several replications of the plaintiff to the second and third pleas by the said defendants pleaded, and to each and every of said rejoinders, saith that he, by reason of anything by the said defendants in said rejoinders or any thereof alledged, ought not to
75 be barred from having or maintaining his aforesaid action thereof against the said defendants, because, he saith, that the matters and things in said several and respective rejoinders set forth, and each and every thereof, are untrue in manner and form, as the said defendants have in said rejoinders set forth; and this the plaintiff prays may be inquired of by the country, &c.

By DENT & BLACK,
Plaintiff's Attorneys.

And the defendants do the like.

It is hereby stipulated that under the foregoing surrejoinder any matter, fact, or thing may be given in evidence which might be given in evidence if set out by special surrejoinder to all or any of said rejoinders. And further that the sufficiency in law of any and all matters set up in each and every rejoinder of said defendants as an answer
76 to the respective replications to which the same is or are pleaded may, on the trial, be submitted to and passed upon by the court.

E. A. STORRS AND
SLEEPER AND WHITON,
Defts.' Attys.

(Endorsed:) Filed Feb'y 6, 1873. W. H. Bradley, clerk.

And afterwards, to wit, on the seventh day of February, A. D. 1873, in the record of the proceedings of said court in said cause, before the Hon. Henry W. Blodgett, district judge, the following proceedings were had and entered of record, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL.

Now come the parties, by their attorneys, and on motion of the defendants, by their attorneys, leave is given them to withdraw their plea of the general issue filed herein, and upon issue joined herein
77 *come* thereupon, come a jury of good and lawful men, to wit: Alexander White, Theodore Perry, Daniel De Shon, William Kelly, George Downs, Wallace Hume, P. Burns, Eugene Rodgens, W. H. Woodbury, W. F. Moore, C. W. Rogers, and William Johnson, who were all duly elected, tried, and sworn well and truly to try said issue; and thereupon, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 8th day of February, A. D. 1873, in the records of the proceedings of said court, is the following entry, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing a part

of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

78 And afterwards, to wit, on the 10th day of February, A. D. 1873, the further following proceedings were had and entered of record, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL. } Assumpsit.

Now come again the parties, by their attorneys, and now comes also the jury in this behalf empannelled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning:

And afterwards, to wit, on the 11th day of February, A. D. 1873, the further following proceedings were had and entered of record, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL. } Assumpsit.

79 Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning:

And afterwards, to wit, on the 12 day of February, A. D. 1873, the further following proceedings were had in said cause and entered of record, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL. } Assumpsit.

Now come the parties again, by their attorneys, and now come also the jury in this behalf empanneled and sworn, and after hearing the concluding evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

80 And afterwards, to wit, on the 13th day of February, A. D. 1873, the further following proceedings were had in said cause and entered of record, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing a part of the argument of counsel, the hour of adjournment having arrived, the further trial of the cause is postpo' until to-morrow morning.

And afterwards, to wit, on the 14th day of February, A. D. 1873, the further following proceedings were had in said cause and entered of record, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL. } Assumpsit.

Now come again the parties, by their attorneys, and now come
81 also the jury in this behalf empanneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same and deliver it to the clerk and disperse.

And afterwards, to wit, on the 15th day of February, A. D. 1873, the further following proceedings were had in said cause, to wit: and entered of record:

JOHN WEARE
v.
J. SAERMAN HALL ET AL. } Assumpsit.

The jury in this behalf empanneled and sworn, this day returned in to court their sealed verdict, wherein they say, "We, the jury, find the issue for the plaintiff, and assess his damages to the sum of five thousand and five hundred and fifty-three dollars and seventy-
82 five cents, and thereupon the defendants, by their attorneys, move the court in arrest of judgment and for a new trial herein.

And thereupon, the said defendants, by their said attorneys, filed in the office of the clerk of said court on the 31st day of March, A. D. 1873, their written motion in arrest of judgment on the finding of the jury, and also their motion for a new trial in said cause.

Circuit court U. S., northern district of Illinois.

JOHN WEARE
v.
J. SHERMAN HALL & WILLIAM J. POPE. }

And now comes the said defendants, by their attorneys, and after verdict in this case and before judgment thereon, and moves the court here to arrest the judgment in this case upon the verdict of the jury, and assign as grounds of said motion—

83 1. The said defendants in their second plea among other things allege that the said plaintiff, after the non-payment of the said bill of exchange in that plea mentioned, and after the protest thereof, and notice to the plaintiffs, undertook and promised the defendants to pay the sum of money therein mentioned, and the interest thereon, and the five per cent. damages given by the statute as damages for the non-payment thereof, which allegations the said plaintiff by his replications has not denied, but has admitted the said allegations to be true.

2. The said defendants in their third plea alleged, among other things,

that the said bills of exchange in the said declaration mentioned were made and delivered to the Frst National Bank of Cedar Rapids; that they became the property of the said bank, and continued so until the commencement of this suit. And the said plaintiff in his replications to said plea has alledged and stated "that the said bills of ex-
84 change in the said declaration mentioned are held by him, and that this suit is prosecuted by him for and in behalf the First National Bank of Cedar Rapids, &c.

E. A. STORRS &
SLEEPER & WHITON,
Defts.' Attys.

If the said court shall overrule the above motion, then the said defendants move the court for a new trial in this action on the following grounds:

1. The court erred in admitting improper evidence against the objection of the defendants.
2. The said court erred in rejecting proper evidence offered by the defendants.
3. The said court erred in its charge to the jury.
4. The verdict of the jury is not warranted by the evidence, and is contrary to the law and the evidence.

E. A. STORRS AND
SLEEPER & WHITON,
Defts.' Attys.

(Endorsed:) Filed March 31,1873. W. H. Bradley, clk.

85 And afterwards, to wit, on the 31st day of March, A. D. 1873, the following further proceedings were had in said cause, to wit:

JOHN WEARE
v.
J. SHERMAN HALL ET AL. } Assumpsit.

Now come the parties, by their attorneys, and now come on to be heard the motion of the defendants heretofore entered herein in arrest of judgment and for a new trial, and after hearing the arguments of counsel the court take the same under advisement.

And afterwards, to wit, on the 10th day of June, A. D. 1873, in the record of the proceedings of said court, is the following entry, to wit:

JOHN WEARE
v.
J. SHERMAN HALL, WILLIAM J. POPE. } Assumpsit.

The court having considered and being now fully advised upon
86 the motion of the defendants hereto' entered in arrest of judgment and for a new trial of this cause, overrules the same.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendants the said sum of five thousand five hundred and fifty-three dollars and seventy-five cents, his damages, so as aforesaid assessed, together with his costs and charges in this behalf expending, amounting to the sum of ninety dollars and five cents, and that they have execution therefor.

On the hearing of said-entitled cause the following exceptions were taken and were allowed by the court and made of record, and are in the words and figures following, to wit:

87 Circuit court of the United States, northern district of Illinois.

JOHN WEARE
vs.
J. SHERMAN HALL AND WM. J. POPE.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Be it remembered, that at a term of the circuit court of the United States for the northern district of Illinois, begun and held at the court-room in the city of Chicago, on the third Monday in December, A. D. 1872, to wit, on the 7th day of February, A. D. 1873, as yet of said December term, 1872, the issue joined in the above-entitled action came to be tried by and before the honorable Henry W. Blodgett, judge of the district court of the northern district of Illinois, and a jury duly empannelled, chosen, tried, and sworn to try the said issues.

88 And the counsel for the defendants thereupon claimed that under the pleadings herein, they were entitled to the affirmative of the issues in the case, and the opening and closing therein, which claim was sustained by the court, the judge saying that he might reconsider the ruling after evidence was in.

And thereupon the said defendant, to maintain the issues joined herein, read to the jury a bill of exchange, dated on the 16th day of March, A. D. 1869, signed John Weare, cashier, drawn on the 3rd National Bank of Chicago, payable at sight to the order of Charles H. Hall, for the sum of $4,500, and endorsed by said Charles H. Hall to Sherman Hall & Pope.

Whereupon the defendants rested their case, and the plaintiff read a deposition of John G. Hazetell, sheriff of Linn County, Iowa, which tended to prove that by virtue of an attachment out of the district court of Linn County, in favor of the First National Bank of Cedar Rapids, Iowa, against Charles H. Hall, he did, on the 18th day of March, 1869, seize the lands and warehouse of Charles H. Hall, at Cedar Rapids, and all the tools, fixtures, and personal property therein, or belonging thereto, all his grain bags and sacks, and all the wheat, corn, oats, and grain therein, and two car-loads, in cars, of wheat, and that some of the wheat therein was claimed by other persons, and was either

89 delivered to them or replevied from him by them, and that he finally, on the 31st day of March, 1869, delivered all the property to William B. Leach, who was appointed by said Linn County district court receiver in the case.

William B. Leach's deposition was also read, and it tended to prove that the grain and personal property of Charles H. Hall in the warehouse, and seized by Haztell, did not amount to the number of bushels which John Weare, in his testimony hereinafter, testifies that Charles H. Hall told him he had, and did not altogether amount to more than between 10,000 and 15,000 bushels; and that the value thereof was not as great as said Weare says in his testimony Charles H. Hall told him the value of the grain that he had on hand was, by $10,000 or $15,000.

That said Leach sold some portion of the property, and after sale and payment of expenses, paid the balance of monies in his hands to the

clerk of the court, and the property undisposed of he turned over to an assignee in bankruptcy, appointed in proceedings against Charles H. Hall.

Counsel for plaintiff also offered in evidence, paper in the words and figures following:

90 "CHICAGO, *March* 15, 1869.

"I, Charles H. Hall, of Cedar Rapids, Iowa, have this day sold to David T. McAfee, of Marion, Iowa, the several lots of grain now in my warehouse and cribs at Cedar Rapids, Iowa, at prices as follows:

"6,000 bushels of spring wheat, at 86 cents per bushel, amount $5,160; 12,000 bushels oats, at price of 42 cents per bushel, amount $5,040; 5,000 bushels corn, at price 35 cents per bushel, amount $1,750; also a certain lot of 1,500 grain-bags, at thirty cents each, amount $450; total amount of value, $12,400. All of which property I do hereby transfer to said D. T. McAfee, and agree to deliver the same to his order, as he may direct.

"In consideration of the foregoing, I have received, in full payment for the property sold, the promissory note of D. T. McAfee, dated the 15th of March, payable at thirty days, for the sum of $12,400.

(Signed) "CHARLES H. HALL."

To which was the following certificate:

"STATE OF IOWA, *Linn County, ss:*

"On this 16th day of March, 1869, before me, a notary public for said county, personally came Charles H. Hall, to me personally known
91 to be the identical person whose name is affixed to the foregoing deed as grantor, and acknowledged the same to be *their* voluntary act and deed.

"Witness my hand and notarial seal on the day and year last above-written.

"R. T. STEVENS,
"*Notary Public.*

"Filed for record March 17th, 1869, at 8 o'clock a. m.
"JOHN J. DANIEL,
"*Recorder.*"

To which paper was attached a certificate signed by said John J. Daniel, recorder, certifying that it was a true copy from the records in his office. To the reading of which paper defendants' counsel objected; the court overruled objection; counsel excepted.

JOHN WEARE, the plaintiff, was then sworn as a witness in his own behalf, and testified that Charles H. Hall began to do business with the First National Bank of Cedar Rapids, Iowa, of which he, Weare, was then cashier and now is president, in Feb'y, 1868; that he had a line of discount from that time to November, 1868, of about $5,000 to $7,000 which was of drafts drawn by him on Sherman, Hall & Pope, the defendants, in Chicago, Ill., at sight and on time, which were accepted and paid as they matured from time to time. That in November, 1868,
Charles H. Hall applied to the bank for an increase of his line of
92 discount to enable him to buy pork and produce; that after consultation between the officers and stockholders of the bank,

it was agreed to extend it. Charles H. Hall was to draw drafts on time on Sherman Hall & Pope, and Sherman Hall & Lebrand, payable in Chicago, against his produce shipped to them, which the bank was to discount and place the proceeds to his credit, and he to draw it out as he wanted it in his business to pay for pork or produce; that the line ran up to $15,000, $20,000 or $25,000, and continued to those figures till some time, the 20th or 25th day of February, 1869.

He was asked the following question:

Do you remember what the footing of the books showed was the gross amount of his business during the time he did business with the bank, & how much of it was between November, 1868, & March 16, 1869?

(The counsel for the defendants objected, the court overruled, and the counsel for the defendants excepted.)

Answer. From February, 1868, to November, $120,000; from November, 1868, to March 16, 1869, $340,000. The line of discount from February to November, 1868, did not vary much from $5,000 to $7,000. The time on which the drafts were to be drawn were to be according Hall's necessities, ten, fifteen, twenty, or thirty days; not very large
93 amount at thirty days; and he did draw in that way.

He further stated that when Charles H. Hall applied for an increase of discounts in November, he asked him if he had consulted with Sherman Hall & Pope, and Sherman Hall and Lebrand about it.

(The counsel for the defendant objected to his stating what was said by Charles H. Hall to him, the court overruled the objection, and the counsel for the defendants excepted.)

Answer. He shewed me a letter from Sherman Hall & Pope to him; the upper part of it was a statement of sales.

(Defendants' counsel objected to the witness giving the contents of the letter, on the ground that it was not the letter of the defendants now in their possession.

The court overruled the objection, the counsel for the defendants excepted, and the witness answered.)

A. He ran over the account of sales, which was, that they had made sales, very favorable sales, and then the letter says: "As to your desire for us to furnish you money to enable you to go into further operations in pork, etc., we are totally unable to do so. We have, in every sense of the word, all we can do to get a line of discount to answer our purposes. You are connected there with the First National Bank and you can
94 make an arrangement with them whereby you can draw on us, and get an extension of your line of discount, that will answer your purposes. We will accept as we have done and will pay." Upon that, and on consultation with some members of the bank, it was thought we would try and accommodate him.

I told Mr. Hall about Feb'y 20 or 25, 1869, this pork business is through, and I want you to come back to your old basis, $5,000 to $7,000. He did not do it; kept on drawing on Sherman Hall & Pope, & Sherman Hall & Lebrand; drafts were discounted and proceeds placed to his credit, and he took it out as wanted, and it got to March without any checking up, and finally told him "You must reduce your discount." I remember distinctly that I thought, "Now, Mr. Hall understands this, and there can be no mistake about it," and that he knew slower or faster.

(To which statement the defendants objected, the court overruled the objection, and the counsel for defendant excepted.)

The witness continued: My view is to convey to the jury just as the

thing transpired. I supposed he understood, and he acquiesced in my demand upon him.

95 (To which the counsel for defendant objected, and the court overruled the objection, and the counsel for the defendant excepted.)

And he continued: He came in in few days and said he had a project with his brother and associates to put in a bid for Government contract for delivering a large amount of oats on the Missouri River to supply Indians & troops, and wanted to continue the loan he already had. I interrogated him in regard to the means he had on hand already. He said he thought on the whole he should have about $15,000 worth of produce in store and in the country. He was not accurate about it. My memoranda shew that it was $15,000 to $25,000.

I finally said to him that changed things. While he was shipping to Sherman Hall & Pope, it enabled them to meet his draft on them. But this grain he proposed to buy was to be held at Cedar Rapids, or shipped west of the Missouri River, and if it was lost by fire or otherwise it might affect their responsibility and ability to meet his drafts; "hence you must arrange that when they accept your drafts they must put up collateral securities that they will pay to the satisfaction of Mr. Parsons, cashier of 3rd National Bank, Chicago." He agreed to do it. He

96 did not, but kept on drawing on them and using the proceeds.

And I finally insisted that the arrangement for collaterals should be carried out. March 11th & 12th he presented drafts to the amount of $13,000; there was one of $10,000 which the bank discounted, and I told him, "Before we go any further you must go into Chicago and arrange this matter of collaterals." He and I came to Chicago on the 13th March, and about 3 o'clock p. m. I went with Charles H. Hall to Sherman Hall and Librand's office to see Sherman Hall. He was not there. We staid half to three-quarters of an hour, and learned he had gone to the stock-yards and would not be back till late. We made an appointment to meet that evening at the Sherman House. I went; met Charles but not Sherman Hall. He said he had arranged the matter and it would all be fixed up. I had to go home that night, and went on the 11 o'clock train. He said he would remain and fix the matter up.

The drafts of 11th & 12th were not all sent in immediately. Some were sent on the 13th, and one was not sent till the evening of the 15th, and there was a delay in mails at Clinton by which the drafts sent the 13th and that sent 15th came into Chicago together.

March 16, when I came to the bank, in the afternoon, the assist-

97 ant cashier, Mr. Dean, handed me Charles H. Hall's bank-book with a $5,000 draft on Sherman Hall & Pope for discount. Hall came in and said, "I want that draft discounted." Talked about going to Chicago, & that I had yet to learn that collateral security had been put to the drafts he had drawn and was to draw. He said, "That has been done; I fixed that up before I left, and the whole batch has been accepted;" that he told his brother to telegraph him when it was done, so he might come in and make me satisfied, and he had a telegram from his brother saying that the whole $13,000 had been accepted and collaterals put up. This was along two or three o'clock p. m. I then asked Hall how much grain he had. He said about 19,000 bushels of oats & about 12,000 of corn and wheat each, making in all, he thought, about $20,000 to $21,000 he had.

(Defendants' counsel objected to this witness giving this conversation, The court overruled the objection and the counsel for defendants excepted.)

He also said that before he went to Chicago Chas. H. Hall took him through warehouse; he climbed up ladders & looked down into dark bins till his head swam, and he felt he did not know much that
98 was there; that there was one large pile of oats in the chamber that made up this large amount of 19,000 bushels. He also said, "I finally told him after hearing all he had said that we would take this one draft, which we thereupon discounted. David I. McCaffee was in the bank & witnessed the transaction, & I felt that he was interested in it. It was about half past three. About four o'clock a telegram was brought in."

(The defendants' counsel objected to the witness stating the contents of the telegraphic despatch. Whereupon the following questions were asked the witness, to which he gave answers as follows:)

Q. Have you the telegram?

A. No, sir.

Q. Do you know what has become of it?

A. It was burned.

Q. Do you know whether the telegram is now accessible—whether it now can be produced?

A. So far as I know, it cannot.

O. What is your best knowledge as to where it now is or what has become of it, rather?

A. Burned in the fire.

Q. Do you think that it was among the files in this case?

A. That is my impression.

Q. From what source do you get any information on that subject?
99 A. A portion of my papers, with my books, I put in charge of my son, down here on the corner of Water and La Salle streets, and he put that in his safe, and they remained there until the fire and were lost.

Q. You think it was lost with these papers?

A. That is my impression.

Cross-examined by Mr. Storrs, the counsel for defendant:

Q. Did you ever have that despatch here?

A. It was my impression we had it here.

Q. Are you certain about that?

A. No, I am not.

Q. If you had it here before, why didn't you produce it?

A. I say my impression does not enable me to say why we did not.

Q. Have you looked after it at all?

A. I looked in my papers here, immediately after the fire, and in the talk with my son.

Q. Have you looked at home for it?

A. No, sir.

Q. And you are not certain whether you had it here or not?

A. My impression is I had everything here pertaining to this suit.

Q. Do you have any definite recollection as to whether you ever had the paper here or not?
100–101 A. I cannot state positively.

Q. But you are certain it was never offered in evidence at all, are you not, anywhere during this trial?

A. I don't remember it was.

Q. Don't you remember in the first trial, for instance, it was not?

A. I don't know, but my impression is it was not.

Q. And you have not looked at home for it at all?

A. No; I thought it was here with my son.

The court. State the contents of the despatch.

(Excepted to by the defendants' counsel.)

A. The telegram stated that the drafts of Charles H. Hall on Sherman Hall & Pope were protested. I thereupon telegraphed Parsons here not to pay the $4,500; it was a fraud. I went immediately to Charles H. Hall's warehouse; found he had gone to Marion, six miles distant. I went to Marion, did not find Hall, but I found that McAffee had purchased the property, and I then returned to Cedar Rapids; went to Charles H. Hall's rooms. He said he had sold all his grain to McAffee. I told him I had a telegram that the drafts are not accepted, and no collaterals are put up; "Give me the $4,500 draft you got from the bank." He said he had sent it to Sherman Hall & Pope. I asked how much he got for the grain. He said $2,000 in cash & $12,000 in short paper. I said, "Give me that paper." He said, "I have sent that to Sherman Hall & Pope." I told him he must go to Chicago with
102 me and arrange the matter with them. He hesitated, but finally agreed to meet me at the train & go. We came on to Chicago that night, March 16; arrived here on the 17th, towards noon; went to Sherman Hall & Pope's office about two p. m.; found Charles Hall & Sherman Hall talking together. Sherman Hall came forward to talk to me. I asked if anything had happened. "Has not your brother a right to draw these drafts?" He said, "Yes." I said, "Is there any reason why these drafts are not paid?" He said, "We will fix this thing up; there will be no trouble about it." I went away, and returned at five at their request; found them there talking. They separated, and Sherman Hall came forward & said, "My partner has been out all day; have not talked this matter over much. You cannot go out to-night. These drafts need not be protested, need be no fears about them, and we will fix this thing up. You come in in the morning about 10 o'clock." I went in the morning. Sherman Hall handed me a letter from Charles, written the night previous, saying he could not do any good staying; would leave for Iowa that night, and they must arrange the business here. I asked if he intended to do as he agreed. He said, "Yes; I am very much interested in my brother. Mr. Pope feels a little sensitive in some things. I desire to have everything satisfactory always, and I have concluded that you take these drafts with you. I will go out. We will look
103 over Charles' matters. Sorry you have had this trouble, but will fix it up out at Iowa. I will meet you at the train." This was the 18th, about noon. I was directed from Cedar Rapids to protest the drafts. I did so; think I took drafts with me. We arrived at Cedar Rapids in the morning; agreed to meet at Charles Hall's rooms about 10 o'clock. I saw Sherman Hall about that time. He said he had not seen his brother; would like to meet me at 2 o'clock. In a few minutes I met on the street.

(Defendants' counsel objected to his stating what he learned on the street. Court overruled objection, & counsel for defendants excepted.)

Witness continued: I learned on street that Charles Hall had left for Council Bluffs, & had been gone from night before. I went to Sherman Hall; told him he had been to his brother's room; "Don't you know he on his way to Council Bluffs? You have made appointment for 10 o'clock. I perhaps can excuse that, but the 2 o'clock appointment, after you knew he had gone to Council Bluffs. This is the first time I have had occasion to say my confidence is shaken in you; that there is iniquity in you; that I am a dupe." He said, "It matters very little what you think. If you beat me at my own game, why then I have nothing to say." After Charles Hall was brought back, I offered Sherman

Hall, if he would give me McAffie's note, and endorse Charles
104 Hall's note for the balance, $12,000 or $15,000, by his firm, Sherman Hall & Pope, I would give them all the time they could reasonably ask. He said, "The thing is a good deal mixed. I shall have to go home & consult Mr. Pope before I do anything more."

Admitted that the books of Sherman Hall & Pope were destroyed in the fire.

Weare further stated that Charles Hall had been shipping grain to Omaha, and a short time before had drawn on a house there for $2,500, which was protested, and it has never been paid. There remains unpaid of Charles Hall's draft on defendants and this Omaha draft between $21,000 & $25,000. The bank has received from sale of Charles Hall's property, seized under attachment, a little over $4,000.

Question. Did you have any conversation with McAffee on the 18th March as to how much he had paid and what amount of notes he had given Charles Hall for this property?

(Objected to by defendants' counsel. Objection overruled by the court. Excepted to by defendants' counsel.)

Answer. I guess the 21st of March I saw McAffee; he had taken possession of the warehouse. Hall was not present when I had this conversation.

(Counsel for defendants objected to his stating the conversation. Court overruled the objection, and counsel for defendants excepted.)

105 Answer. I asked, "Have you purchased this grain?" "I have," said he. I said, "What did you give for it; how came you to purchase it?" He said, "I was urged to buy it by Sherman Hall & Pope and Charles Hall, and I thought there was some money in it, and, like all the world, I bought it. I wanted to make some money. If you will give me $2,000, I will give it up." I asked him what he paid; he was in doubt in regard to it; said he paid $2,000 in money and had provided satisfactorily to Sherman Hall & Pope & Charles Hall for the balance.

Question. Did you ever hear McAffee make any statement subsequent to that whether he received the $2,000?

(Objected to by counsel for defendants. Court overruled the objection, and counsel for defendants excepted.)

Answer. A day or two after the grain was attached he said to me that he had got me into that matter; didn't understand it just at the time, but that he was not out of pocket any; that he had made Sherman Hall and Pope refund to him the money which he had paid, and the notes had been returned, so that he was just where he begun.

Q. I will ask you now to refresh your recollection whether he
106 didn't say he never had paid $2,000 in money, and that he had got his notes back.

(Objected to by the counsel for defendant. Objection overruled, and counsel for defendant excepted.)

A. I don't recollect that he did say in regard to the money; it was spoken of, but he did not speak about the notes.

Q. State whether or not Mr. McAfee ever took any legal steps or otherwise to keep possession of this grain after it was attached by the bank.

(Questions objected to by the counsel for defendant. Objection overruled, and counsel for defendant excepted.)

A. I knew he did not, and he assured me he should make no effort whatever.

(Counsel for defendant moved the court to hear the answer ruled out as not responsive to the question.)

By the COURT. The testimony can all be taken subject to the general objection.

(To which the counsel for defendant excepted.)

It is admitted by the counsel for defendants that the letter written by Charles H. Hall to Sherman Hall and Pope on the 16th day of March enclosing the $4,500 draft to them was burned up in the fire of October 9th, 1871, and the witness was asked to state the contents of that
107 letter, and he stated it as follows:

The letter bore date on the 16th of March. The enclosure was expressed in form: "Herewith find $4,500 to my credit. I have this day drawn on you, through the First National Bank, a draft for $5,000 in favor of John Weare, and it has been discounted by the First National Bank, and he (underscored) expects you to put up the collaterals."

Q. In any of your conversations with Charles H. Hall was anything said with regard to the amount of his indebtedness? If so, state what was said about his indebtedness and when that conversation was.

(Objected to by counsel for defendants. Objection overruled, and counsel for defendants excepted. The witness answered:)

When he first made his application to me for money and to do business with the bank, among other things I asked him, "How do you stand in the world? How is your pecuniary matters? What is your obligations? Do you owe much or not?" He said to me, "I owe about $5,000 aside of a mortgage of $10,000 which is on my warehouse; that is all the indebtedness there is standing against me." He said, too, that that $5,000 was made up of money that he had borrowed, and was in transit to his credit, and had not been brought around and finally
108 closed up, but he really felt that he did not owe much of anything except the $10,000 mortgage. I knew the ground and warehouse very well, but I don't know that I could be called a good judge of the property.

Q. What, in your judgement, was it worth?

(Objected to by defendants; objection overruled, and exception by the counsel for defendants.)

A. I think the warehouse at that time was worth twelve or fourteen thousand dollars. Twelve would be a low rate, and fourteen would be called a pretty full price. On the 17th or 18th March I asked Sherman Hall what his brother owed them. He said $7,000.

Q. Do you know whether Mr. Dean, your assistant cashier, heard the conversation between you and Charles Hall?

A. He says he did not.

(Counsel for the defendants object to the answer, & move to strike it out.

Court refused. Counsel excepted.)

On his cross-examination he said, "I am not the owner of the drafts sued on; they belong to the First National Bank of Cedar Rapids. The bank owns them, and I have no pecuniary interest in them except as a stockholder. I am not sure I owned any stock when these drafts were discounted. The $5,000 draft of March 16, 1869, was sent
109 in a letter that evening to the 3rd National Bank, Chicago, for collection. The letter, after referring to the draft, was, in substance, as follows: 'Mess. Sherman Hall & Pope, & also Mess. Sherman Hall & Librand, are to place in your hand satisfactory security for this and all paper accepted by them in the future. If this is not accepted and secured as above, please telegraph me.'"

The plaintiff read as evidence entries on the ledger of the First National Bank of Cedar Rapids, the cash-book, bills payable and bills re-

ceivable, book from the bills receivable, book on entry of the draft of Charles Hall on Sherman Hall & Pope, dated March 16, 1869, for $5,000, and a statement that judgment was recovered on it on March 7, 1870, against Charles H. Hall in the attachment suit before referred to.

William P. Black, one of the attorneys for the plaintiff, was sworn for the plaintiff. He said that the books of Sherman Hall & Pope were in evidence on the former trial of this case; that he examined them touching the account of Charles H. Hall. The account ran back into a former firm, composed of Monroe C. Sherman and the defendants, which was terminated by Sherman's death. My recollection is, Charles H. Hall was indebted to the firms jointly.

(Counsel for defendants objected to the evidence as immaterial. Objection overruled. Exception by defendants' counsel; & the witness continued:)

110 The indebtedness was about $24,000 when he commenced business with the 1st National Bank of Cedar Rapids, but much larger to Sherman Hall & Pope than to Sherman Hall & Librand.

The books shewed an increase of indebtedness between them and the credit of the drafts of 11th & 12th of March of $3,000 or $4,000.

After that the account was credited with proceeds of the drafts of 11th & 12th March	$11,500 00
Amount of bill of exchange read in evidence by the defendants	4,500 00
And McAffee's note	12,400 00
	$28,400 00

Before the credit of the McAffee note there had been a balance struck, and there was a debit against Charles Hall. Then the McAffee paper was entered in pencil, very soon after the 17th March, obliquely across the page, and showed a balance of about $100 to the cred. of Charles H. Hall. The entry of the McAffee paper was not transferred from any other book. He gave a part of the contents of the letter which enclosed the $4,500 draft to Sherman Hall & Pope, substantially as given by Weare.

N. M. HUBBARD, counsel for plaintiff, was sworn for plaintiff. He said he had examined the books of account of the defendants as to Charles Hall's account. They showed the gains & losses of

111 produce sold, and the losses exceeded the gains in round numbers $4,000 between Feb'y, 1868, & March 16, 1869. The ledger showed that he was indebted to the two firms when he commenced business with the bank in round numbers $24,000; all but about $2,000 or $3,000 of it to Sherman Hall & Pope. All but $1,500 of proceeds of drafts of 11th & 12th March came to Sherman Hall & Pope; also the $4,500 draft of March 16 & McAffee's notes, $12,400, and left a credit to Charles H. Hall of about $100. He stated the contents of the letter of March 16 from Charles Hall to Sherman Hall & Pope substantially as the witness Weare.

GEORGE E. GOOCH sworn for plaintiff. Was book-keeper & cashier for Sherman Hall & Pope in 1869. The drafts drawn by Charles H. Hall were usually accepted by Mr. Pope and himself; had no general authority to accept drafts; never accepted any without showing them to Pope first; does not remember now of some drafts coming in for acceptance on the morning of March 16, nor that he told the collector of the Third National Bank anything about any drafts brought in about

that time, nor of declining to accept, nor of referring it to a later time in the day. When drafts came in I always showed them to Mr. Pope, day by day, before I accepted them. The messenger from the bank would have a notice. I would show it to Mr. Pope and ask
112 whether I was to accept it, and would go round to the bank and accept it the same day.

WILLIAM S. BRADLEY sworn for plaintiff. Was collector of 3rd National Bank of Chicago; has a recollection, not very definite, of taking a batch of drafts to the office of Sherman Hall & Pope for acceptance about March 16, 1869; does not remember amount; was one of $5,000; does not remember who was present; presented them to Mr. Gooch; thinks neither member of the firm were in; thinks Gooch said, "Leave notice of them and will see about this afternoon;" had a printed notice for that purpose where parties were not ready to see about it at the time; did not go again in the afternoon; think they did not come to the bank; think cashier telegraphed First National Bank Cedar Rapids in regard to these drafts: don't remember distinctly.

Cross-examined:

Have no positive recollection of presenting drafts on 16th March. Cannot be sure whether it was 16th, 17th, or 18th. The usual practise was to protest drafts for non-acceptance the same day they were presented, in the absence of any instructions not to protest. It was our invariable custom to protest immediately on refusal, after bank-hours. Time-drafts are presented at once for acceptance. We make it a rule to be prompt.

113 S. V. PARSONS, cashier of 3rd National Bank of Chicago. Has recollection of drafts drawn by Charles H. Hall on Pope, favor First National Bank Cedar Rapids, to quite a large amount, having gone through our bank. Closing up was about middle March; can't swear positively as to date last was presented. Telegraphed Weare of refusal to accept about middle. Don't know whether more than once. Recollect telling him certain drafts were refused, by telegraph. Recollect distinctly there was one draft of $5,000. Can't remember just the amount presented about middle of March; these we had for acceptance and already accepted were $25,000 or $26,000. Weare was in Chicago previous to refusal to accept batch of drafts.

Question. At that time, state whether any arrangement was made whereby you were to receive collaterals from Sherman Hall & Pope for their acceptances of these drafts in favour of the First National Bank.

(Objected to his stating any arrangement between him & Weare. The court overruled the objection, and defendants' counsel excepted.)

Ans. He stated to me that with drafts that were accepted, such collaterals would be given to me as would be acceptable to me. All drafts thereafter accepted. Think Weare came into bank next
114 day after I telegraphed him of non-acceptance.

On cross-examination:

Notices of protest of two drafts for non-payment were identified by him, dated March 17, 1869; and notices of protest for non-acceptance were shown and identified by him, dated March 18, 1869, of drafts to the amount of $15,500. Thinks he telegraphed Weare two days previous to date of these notices. Did not present them on 16th or 17th. Did present on the 18th, personally.

that Weare wanted us to put collaterals with our accommodation acceptances of his drafts. We refused any, but told him if collaterals were to be put up he must furnish them. He told me that he had conferred with McAffee, whom he met in Chicago at that time, about taking an interest in his business and buying his grain-bags &c., at Cedar Rapids, giving his notes for them, and in that way he could furnish the collaterals. I recommended him to make the arrangement with McAffee if he could. I thought it would be a good thing for him if McAffee became interested. He did make an arrangement to sell the grain in his warehouse, &c., for $12,400 to McAffee. At Charles Hall's request I drew the bill of sale. It was not executed nor delivered. McAffee proposed to go and examine the grain, &c., before completing the arrangement, and they left for Cedar Rapids on the night of the 15th March. If the trade with McAffee was consummated we were to receive the paper to put up at the Third National Bank, Chicago, as
120 collateral to our acceptances, and for no other purpose; were to have no further interest in it. We never did receive the paper nor any money from McAffee, the proceeds of Charles Hall's property. As I was advised at the time, MacAffee was willing, after examining the property, to buy it at $10,400, and give his notes for $12,400, and draw on us for $2,000, as a guarantee that the property was worth $10,400, instead of $12,400. I understood that McAffee was to be interested with Charles Hall in his business. He did draw on us for $2,000. We paid the draft, & he afterwards repaid us.

The drafts received from Charles H. Hall and the proceeds of sales of produce shipped to us by him were always applied to payment of sight and time drafts drawn on us by him and for no other purpose. When we received a draft, or made sales of shipments, we gave him credit, and when we accepted a draft we charged him with it in his account, and we gave our check to pay the acceptances as they matured. Not one dollar of the proceeds of any property sent us or sold for Charles H. Hall's account, nor of drafts sent us, or monies paid us by Charles H. Hall, was applied to the payment of his indebtedness to the old firm, but all was used to pay drafts drawn on us in his business.

121 Witness produced a balance-sheet made by Gooch the bookkeeper, in 1869, showing the state of Charles H. Hall's account, April 22, 1869, & June 22, 1869. The debit balance April 22, which included so much of the proceeds of the drafts of 11th & 12th March, as were received by Sherman Hall & Pope, & the $4,500, now claimed as set off, in this case was $12,367.04, and June 22, $12,567.04. Witness says that is the way the balance was on the books when destroyed.

We never agreed to furnish and put up collaterals to Charles Hall's drafts on us other than in the manner I have before stated. When Charles Hall left here on the night of the 15th March, I did not know that he contemplated a loan through the First National Bank on the next day. I was not aware that he was or intended to make any representations to John Weare with reference to collaterals, or anything else, for the purpose of procuring a loan. There was never any conversation between us as to his making any representations for that or any purpose. I did not know that any had been made by him when he procured the discount of the $5,000 draft, or ever heard of it till I heard it on the trial of some of those cases. Weare said nothing about it on the 18th March, nor made any complaint of the kind to me, or in my hearing. He made no claim on me as to our liability, and I did not
122 hear him make any to Sherman Hall; I neither made nor heard Sherman Hall make any statement to Weare of the state of Charles Hall's account at that time.

The pencil memoranda of the McAffee note, spoken of by Black & Hubbard, were not in the dollar and cents' column. There was no regular credit of the amount nor any balance struck. It did not appear on any other book. The letter-book of the bank was in evidence on the former trial; a letter was read from it endorsing some of the drafts of 11th & 12th March. My recollection is that the letter of March 15, 1869, said nothing about collaterals.

On cross-examination he said the indebtedness of Charles Hall to the old firm was never transferred to the books of the new—did not appear in his account with the new firm. I believe the $5,000 of March 16th would have been accepted if payment of the $4,500 draft had not been stopped, and that if the drafts of 11th & 12 had been presented before that in the regular way that they would have been accepted.

Feb'y, 1868, Charles Hall had credit on our book of one or two thousand dollars. March 18, 1869, he owed us $125,370, & I suppose the property attached at Cedar Rapids would cover a good portion of the property he appears to have lost—$4,012 is probably below its
123 value. The pencil memorandum, McAffee's notes, was put there in calculation, probably; McAffee expected his note to be sent to us to put up as collateral for Charles H. Hall's drafts.

When payment was stopped on the $4,500 draft, there were acceptances of ours of Charles Hall's drafts amounting to $9,000; two of them were the acceptances in suit; the others matured on the 17th. I had received from Sherman Hall notice of an arrangement made between him and M. Walker at Cedar Rapids, by which we were to pay the $9,000, and the bank was to receive the $4,500 in part payment of it, or pay it, we paying ours. I went to Mr. Dent, one of the plaintiff's attorneys, and offered to carry out the arrangement. He told me he had received a telegram from Cedar Rapids in Walker's name not to do it. I sent telegram to Mr. Walker that the arrangement was refused here. He telegraphed back from Marshall Town, Iowa: "On my way west, I desire arrangement carried out." Signed "W." or W. H. Walker. I had that telegram in my hands when Dent told me he had been telegraphed to from Cedar Rapids. Think he said, signed by Walker not to carry it out. I paid $4,500 of the $9,000, March 22nd or 23rd.

GEORGE GOOCH recalled by defendants:

124 I was familiar with books of old firm of Sherman, Hall & Pope, and the account of Charles H. Hall thereon. It was never transferred to the books of the new firm. Think the balance was about $20,000 in 1869. Had the account been transferred, the debit balance of Charles H. Hall's account in the new books would be that much larger. The books of Sherman Hall & Pope, May 1, 1867, showed credit to Chas. H. Hall's account of $2,500 00
May 1, 1868, credit balance 3,812 68
October 6, 1868, debit balance $5,627 12
March 17, 1869, debit balance $12,237 87
Ap'l 22 " " " 12,367 04
June 22 " " " 12,537 02
This, included credit of $4,500 draft in litigation and not paid, makes debit balance that much more. There were no entries on books, showing loss or gain on shipment of grain or produce of any kind. Those items refer entirely to grain bought & sold in Chicago, and his account was credited or debited simply with the loss or gain.

J. SHERMAN HALL, defendant, sworn:

I attended to the business of Sherman Hall & Librand; Pope to that

of Sherman Hall & Pope. Charles Hall, in 1863 or 1864, became largely indeted to the old firm of Sherman, Hall & Pope for losses on wool; between $20,000 & $30,000 at Mr. Sherman's death about May 28, 1866.

125 Over $20,000 unpaid now never was transferred to new firm's books nor appeared on it in any way. It was in notes given about time loss occurred which existed at time of the fire, and were destroyed.

The new firm opened entirely new set of books, and Charles Hall's account was a new account on them. Don't think any effort had been made to collect the account; before Sherman's death it was understood he would not be troubled about it; would take his own time to pay it.

In 1868 he applied to us, desiring to draw time-drafts on us, with the understanding that they were partly represented by property held by him in his business at Cedar Rapids, and that he should provide for their payment at maturity. They were entirely for his accommodation. We derived no benefit from or received one cent's consideration in any way—only the commissions we received on sales of shipments; sight-drafts paid by us usually 3 to 5 days before the property was sold to re-imburse us.

We kept no account of gain or loss on his shipments. The gains & losses shown on our ledger were for purchases and sales here—nothing else.

126 Don't know that I knew when my brother commenced business with First National Bank, Cedar Rapids, or that he contemplated doing so. May have. We received drafts drawn by that bank on 3rd National of Chicago from my brother to pay drafts accepted by us for his accommodation. We never used them for any other purpose than to pay those acceptances, placed the amount to his credit on our books, charged him with the acceptances when made, and gave our checks to pay them at maturity. Never applied proceeds of sales of property shipped to us by my brother to any other use than to pay his drafts accepted by us for his accommodation.

March 13, 1869, my brother told me that Weare had come in with him and wanted us to put up collaterals to our acceptances; thereafter I told him we would not furnish any; that if he wanted any collaterals put up, he must furnish them; we would put up such as he furnished. I spoke with Mr. Pope the same day; he said the same thing; never had any conversation with Weare, Parsons, or any person connected with the 3rd National Bank on the subject; remember the negotiation with MacAffee. My brother told me he had partially negotiated with him on the 15th March for a sale to him and McAffee; was going into partnership with him. I told him I thought it would be a good thing for him to do. I saw McAffee at our office that evening; a paper

127 was drawn up for a bill of sale; did not examine it then; the sale was not consummated then. My brother mentioned that he was forced to do something of the kind; that with McAffee's note he could furnish collaterals as Weare required, and if he could arrange in that way he would not be bothered thereafter in going on with his business. He & MacAffee went that night to Cedar Rapids. I had no conversation as to his making any additional loans of the bank; did not know he contemplated. He said nothing to me about it. We received a letter from him the morning of the 17th, enclosing this $4,500 draft, to pay two of his drafts maturing that day. We deposited it in our bank, and about one o'clock it came back through the clearing-house, payment stopped; don't remember that the acceptances were presented for payment before the $4,500 draft came back. The letter enclosing the draft

was in substance: "Enclosed I hand you First National Bank draft on Third National Bank of Chicago for $4,500, amount of acceptances due to-morrow. I have this day drawn on you in favor of John Weare for $5,000, at 15 days' date. Mr. Weare insists on having collateral security placed with your acceptances, as we talked in Chicago, and expects that collaterals will be placed with this and all drafts accepted hereafter." "I" or "we" have arranged for a line of discount of $20,000 to $25,000
128 to run from 4 to 6 months; think the words "expects collateral securities" were underscored.

I know that we never wrote any such letter to my brother as Weare says my brother read to him in November, 1868. Our letter-books showed no such letter, and we invariably keep copies of all letters, no matter how unimportant. There never was any telegram from Parsons to Weare read in evidence or exhibited in any trial growing out of this transaction.

I think it was about 4 o'clock p. m., March 17th, I first met Mr. Weare. The Pacific express train, on which he and my brother came, left Cedar Rapids at 2 o'clock in the morning, and reached here at that time, about ½ past 3 p. m. They came to our office together. My brother introduced him to us. He said "I have done a great deal of business through your names, but never had the pleasure of meeting either before." The interview lasted perhaps half an hour. Weare stated that he had come up to see if he could fix up matters. I asked him, about the first thing, why he stopped payment of the $4,500 draft; he said I found out Charley had sold his property to McAffee & *ke* thot he would stop payment of it. I said we have not paid our acceptances due to-day, and should not, nor any further acceptances until he authorized payment of that draft. He asked if we had accepted drafts
129 of 11th & 12th. I told him they had not been presented, and if they had been that afternoon, we would not accept them probably. I knew nothing of their having been presented till the afternoon of the 18th. Weare said if we would accept all the drafts Charley had drawn on us, & pay those we had accepted, he would authorize the payment of $4,500 draft. We made an appointment for next morning.

Next morning I found letter from my brother, testified to by Mr. Weare. I handed it to Mr. Weare. I had no knowledge, intimation, or information that my brother intended leaving, and I was very much surprised, indeed, when I received the letter, to find he had gone. Pope & Gooch were present. On presenting Weare the letter I told him I did not know what could be done. He made the same proposition he had the day before. I told we could not accept it; told him I had best return to Iowa with him, and anything that could be done there to make it satisfactory all round we would do. I would use every endeavor to have it so. I went on 'Change. Weare came in half past one or two. He, Pope, & I went to lunch. I told him I would go that afternoon. He agreed to take the unaccepted drafts with him, and I agreed to take the $4,500 to see if we could make any arrangement after we got
130 there. I took the $4,500; he did not take the others. I arranged with Weare to meet at my brother's room at 10 a. m. the 19th. I went to hotel where my brother stopped; enquired for him. He had not been there; went to his room. His room-mate had not seen him, which surprised me a good deal; met Weare about 10 o'clock; told him I had not seen my brother, and was not ready to negotiate with him; would meet him at 2 o'clock. I did not then know where my brother was. Shortly after I saw McAffee; he told me he thought my brother had gone West; that the warehouse, McAffee's grain, and grain he had

bought two days before had all been attached by the bank; met Weare again; told him I understood my brother had gone out of town; that he had attached all his property, and had deceived me very much in bringing me out here; that I then knew that when he received the long telegram in our office, & arranged with me to come out there, he knew all about the attachment of the property; that he had deceived me, and I would have no further negotiation. I did not tell him, "If you beat me at my own game I have nothing to say." I never used such a phrase in my life. Weare said he thought they had everything all safe. I immediately left him. I read copy of letter in the letter-book of bank, dated March 15, 1869, enclosing drafts to the National Bank.

131 There was no allusion to collaterals in that letter.

The witness' statements were substantially the same with reference to the pencil memorandum of McAffee's note as Mr. Pope's, with the addition that he thought it was put there on the 17th or 18th, during the interviews with Weare, to see how the account would stand with that credited. He said we expected to receive it with the understanding that it was to be used as collateral security for the drafts we accepted for my brother. We paid McAffee's draft of $2,000, charged to him, and he afterwards repaid it, and that closed the account; never received or had the McAffee note.

On Monday, the 22nd, had an interview with Walker, president of the bank, Weare, & Blair, one of the directors. I told Mr. Walker before anything was done, so far as our firm was concerned, if the bank would pay the $4,500 draft, we would pay our acceptances, amounting to $9,000. He said they had decided to do that that was fair, and turned to Mr. Weare and asked him if that was satisfactory to him. I told him so far as my brother is concerned he must make his own arrangements. My brother proposed to give them McAffee's notes and all his property, his life-insurance, &c. We separated to see what my brother could do to secure the balance of his indebtedness. I told them

132 when they proposed that we should endorse my brother's paper, that I could make no arrangement to do so without seeing my partners; that that part would be out of the question.

We met again in the afternoon. My brother had not been able to get any one to secure his paper, and they declined to release the attachment and take McAffee's note.

I then asked Mr. Walker how it was about our agreement, so far as our firm was concerned. He said that was all right; they would carry that out, and had or would telegraph to Chicago to have it done; for us to pay our paper & they pay theirs. I told him we would pay our acceptances at the same time. I telegraphed Mr. Pope the arrangement I had made. I remember the telegram from Mr. Walker dated Marshalltown, March 23, testified to by Mr. Pope. It was "On my way west. I desire arrangements made at Cedar Rapids carried out." He made same statement as to balances of Charles Hall's account, as Pope & Gooch, as shown by books & trial-balance; that the memorandum testified to by Pope was received by him at Cedar Rapids; says that was first knowledge he had that the drafts had been protested for non-acceptance.

133 The witness presents the drafts drawn on his firms by Charles H. Hall through the First National Bank, and accepted by them and paid; and by a comparison of the dates and amounts, the time-drafts tended to show that they were principally renewals of former drafts.

On cross-examination he said that up to the 17th of March they had

supposed his brother was entirely solvent and in good business circumstances, not counting the old debt to the old firm, which they did not expect to crowd him, and left entirely out of the question—knew that his elevator or warehouse property was mortgaged to the amount of $10,000.00; that he thought the sale to McAffee was talked of on the afternoon of March 17th, and we told Weare the purpose for which we understood it was made; that it was according to the arrangement between him and Charley that he was to put up collaterals to his drafts.

CHARLES H. HALL, sworn, says that during time he was doing business with First National Bank of Cedar Rapids, he drew drafts on defendants which they accepted; that from time to time he procured money or drafts from the bank to meet them as they were maturing, and when doing so Weare would often ask him what he wanted of so much money, and he would say such an acceptance becomes due
134 to-morrow. He testified that on the 16th March he told Weare that he wanted the money to send to defendants to pay acceptances due the next day, and Weare turned to his book & ascertained that $4,500 was to mature the 17th. He says he did not tell Weare that the drafts of 11th & 12th had been accepted and collaterals put up—told him all had been accepted that had been presented, but that those drafts had not been presented. Did not tell him that collaterals had been put up, but did tell him they would be to all drafts accepted thereafter. Did not receive a telegram from Sherman Hall, and did not tell Weare that he had. That Weare signed the $4,500 draft, and delivered it to him over the counter. Wanted him to take currency, which refused, telling Weare he would have to pay express charges on it. He took the draft, went to his office, wrote his letter, enclosed the draft, went to the train, and mailed it then. He gave the contents of the letter substantially as Pope & Sherman Hall. That he sold his grain to McAffee, took his notes 30 days. Told McAffee the reason that I wanted to furnish collaterals for my drafts, and that he made the sale for that purpose. That after they got to Cedar Rapids McAffee looked over the warehouse, estimated the grain, and was willing
135 to close the trade at $10,400, & gave his note for $12,400, and drew on Sherman Hall & Pope for $2,000. That when Pope drew the bill of sale, if McAffee closed the trade, I would send the notes to them to put up as collaterals. At Marion I signed the bill of sale. McAffee made his notes for $12,400, drew on Sherman Hall & Pope for $2,000, deposited the note with Mr. Stevens, a banker, until he heard from Chicago that the $2,000 draft had been paid, when Stevens was to send the note to me or to Sherman Hall & Pope. The note was payable to my order, and when I left it I endorsed it. It never was delivered to Sherman Hall & Pope, but was afterwards returned to McAffee when the bank refused to accept it and release the attachment. When I saw Weare at my room on night of 16 I told him the note was to be sent to Sherman Hall, and that I had sent them the $4,500. We came to Chicago, arrived here between 3 & 4 o'clock p. m., went directly to Sherman Hall & Pope's office. I introduced him to them. He said he had done business through their name, but had never had the pleasure of seeing either of them before. He asked them why their acceptances due that afternoon were not paid. My brother told him he had stopped payment on the $4,500 draft, and they did not in-
136 tend to pay them unless that was done. He made the same statement, as to that interview, as Hall & Pope have made; and said before he left the office he told Weare he had made the sale to

McAffee for the benefit of the bank, and expected they would be sent in to be used as collaterals; that when Weare asked him about the sale at Cedar Rapids he told him that he did it to furnish collaterals and to carry out the very idea he had insisted on. He said, when he got to Cedar Rapids, the morning of the 18th, he found that the bank had attached everything. Went to Marion to see McAffee, and finally, fearing that his property at Omaha would be attached, he determined to go there, and, if possible, secure that, so that it would not be attached and squandered in a lawsuit, and apply it to pay his debts; that it was attached by the bank before he got there, and he was arrested at Council Bluffs and brought back under arrest; that while at Council Bluffs he telegraphed to C. W. Mash, of Omaha, who came over, and he made sale of his grain there for $1,500, which was worth, in ordinary times, $3,500 or $4,000. He testified to the interview with Walker, Weare, and Blair, testified to by Sherman Hall, and stated it substantially as he has.

Says he told Weare, when he asked him about the amount of
137 his grain, that his books were about three weeks behind, but as near as he could estimate he had about 19,000 bushels of grain altogether, 12,000 of oats, & the balance equal parts corn & wheat. Don't think was quite as much wheat—more oats and corn—had a little more bushels altogether.

He stated on cross-examination that Sherman Hall and Pope gave McAffee an agreement as to the amount of property in the warehouse, guaranteeing that there was the amount I represented it. It was made and delivered to McAffee at the same time I delivered the bill of sale to him; that he left Cedar Rapids for Omaha in a freight train, and kept it till the passenger-train overtook him 36 miles west; that the bank had discounted a draft of $2,500 drawn by witness against the grain at Omaha, which draft had been protested before the sale to Marsh.

JOHN WEARE was recalled and stated that, at the time Sherman Hall went out to Cedar Rapids, there was not in any of the conversations a proposition made to give the bank the McAffee paper, turn over the Omaha grain or its proceeds, and to pay the acceptances of Sherman Hall & Pope upon the condition of the payment by the bank

of the bill of exchange; that there was no proposition to turn
138 over the Omaha grain or its proceeds; that he would have been willing to have taken McAffee's paper; that Charles Hall did not offer to turn over his warehouse property at Cedar Rapids, and that he never proposed to take the grain in the warehouse rather than McAffee's paper. He further stated that a number of drafts drawn on the 11th and 12th were sent in on the 12th or 13th of March, and the balance were sent in on the 15th; that he afterwards learned that, by the detention of the mail-bags at Clinton, the drafts that were sent in on the 12th or 13th, and those that were sent on the 15th, all went in together, and arrived in Chicago on the night of the 15th or morning of the 16th; hence I said to Charles Hall, how do you know that those drafts have been accepted and collaterals put up. Neither Charles H. Hall, Sherman Hall, or Pope, up to the time negotiations were through there, ever mentioned to me that the sale to McAfee was for the purpose of getting paper to secure the acceptances of Sherman Hall and Pope, or that it was for the benefit of the bank. Mr. Walker, the then president of the bank, is in New York City; left Ceder Rapids last fall; been back once since.

On his cross-examination he testified that he did not know whether

he stated on the last trial of this case that he would not
139 have accepted McAffee's paper as collaterals to the acceptances of Sherman Hall and Pope, or that he would rather have had the grain which he supposed was in the warehouse, than any man's paper; that the understanding between him and Charles Hall was, that the grain, that he purchased for the western market, was to remain in the warehouse at Cedar Rapids; that he could not say that it was all the grain that was then in, or that should be there, but the grain that he proposed to purchase for the western market; that he wanted the money for the purpose of buying; should remain in the warehouse; that he could not remember whether he testified on the former trial that Charles Hall said he wanted to ship wheat into Chicago, and that he gave permission for them to move that grain away from there; that they should then make their acceptances secure.

Thereupon, counsel for the defendant asked the witness whether he was not asked the following questions, and whether he did not answer them as follows, on the former trial:

"Q. Why was it that you required Sherman Hall and Pope to put up collaterals?

140 "A. This man Charles Hall wanted to begin to move this grain off.

"Q. Off where?

"A. He wanted—I remember he said he wanted to ship the wheat to Chicago."

The witness answered, yes, sir.

Q. You swore to that, didn't you?

A. Yes, sir.

N. M. HUBBARD was recalled, and testified that the grain in that warehouse at Cedar Rapids was measured or estimated, so that it was known by Saturday noon the amount of grain there was in there, and that they figured it up, and all the grain there was there was about $5,000 worth, and the officers of the bank knew the amount.

The witness was asked whether at the meeting between Sherman Hall, Mr. Walker, Mr. Weare, and himself on Saturday night, the 18th, he communicated to Hall the fact of their having made a measurement, and his knowledge of the amount.

(Question objected to by defendant; objection overruled, and counsel for defendant excepted.)

Witness answered that he did not remember that he told him about the measurement, but stated, in general terms, to him that they
141 knew the value of the grain in the warehouse, and what the value was; that he was then attorney and advisor of the bank.

The counsel for the defendants read from testimony of John Weare, taken by a short-hand writer on the former trial of said cause, on his cross-examination, extracts which tended to show that he knew that the many of the drafts which Charles H. Hall drew on Sherman Hall & Pope & Sherman Hall & Librand, from time to time, were renewals of former drafts about to mature; that the proceeds of some them were sent to Chicago, the defendants to meet the drafts maturing, of which they were renewals; that he did not suppose when he sold him the $4,500 on March 16, 1869, that he was going to use that draft in buying grain at Cedar Rapids or anything of that kind; that as early as November, his suspicions were aroused as to the use Charles H. Hall was making of the proceeds of the drafts discounted by the bank; that he was borrowing money for the defendants; that it did sometimes occur to him when

Charles H. Hall called for a draft on Chicago, that a draft on the defendants for the same amount would mature in Chicago the next day; that if Charles H. Hall faithfully applied it to that purpose no harm was done; that if there were acceptances maturing in Chicago, and Charles
142 H. Hall came in the day before the maturity, and asked a discount for the amount thus maturing, one inducement for having it would be the thought that the bank would get it back the next day—if he knew how it was going to be applied, if he supposed he was going to apply the draft in payment of the acceptance maturing the next day; that, knowing that acceptances of Sherman Hall & Pope matured the next day, he would have let Charles have drafts on Chicago sufficient to take up the acceptances a little quicker had he known he was going to send it to Chicago; that on the 16th of March, 1869, when he discounted the $5,000 draft on Sherman Hall & Pope, and the amount less discount was passed to his credit, he knew that Charles drew his check for $4,500 for a draft on Chicago of that amount; and that he knew that $4,500 in paper matured the next day, and that he supposed he was going to send it to Sherman Hall & Pope; that Charles H. Hall began to talk about moving the grain, on which the large line of discount had been made, from Cedar Rapids to Chicago, he required collaterals to be put up to the acceptances of Sherman Hall & Pope; that he would not have been willing to let Charles sell all the grain at Cedar Rapids to
143 McAffee; would not have accepted McAffee's note as collateral to Sherman Hall & Pope's acceptances at that stage; hardly thought he would have done so just before the collapse; that he would rather have the grain than anybody's paper.

The testimony being closed, the plaintiffs' counsel moved the court for a change of the ruling by which the defendants were given the affirmative in proving the issues in the case, and that the counsel for the plaintiff be allowed to open and close the argument of the case to the jury. The counsel for the defendants objected. The judge of the court overruled the objection, and ruled and decided that the counsel for the plaintiff should open and close the argument to the jury; to which ruling and decision of the said court the counsel for the defendants then and there in due form of law excepted.

And thereupon the argument of the cause under the ruling and decision aforesaid was opened and closed by the counsel for the plaintiff. And after hearing the arguments of the respective counsel, the judge of said court, having reduced his charge to the jury to writing, read the same to the jury, as follows:

"GENTLEMEN OF THE JURY: The main if not the only ques-
144 tions in this case have reference to the validity of a draft drawn on the sixteenth day of March, 1869, by the First National Bank of Cedar Rapids on the Third National Bank of this city, payable to C. H. Hall, and by him endorsed to the defendants, and by them pleaded as a set-off against the bills set out by plaintiff in his declaration."

And to that part of said written charge the defendants, by their counsel, did then and there in due form of law except.

"2. The issues are, under the pleadings, as follows:

"First. That the consideration for the said draft has wholly failed; of which the defendants had notice at the time they received the same, and that it is not now a valid demand against the said plaintiff in the hands of the defendants.

"Second. That the said draft was obtained from the said bank by certain fraudulent acts of the said Charles H. Hall, of which defendants were cognizant at the time they took the same, and that the said dratt

is void in the defendants' hands by reason of said fraud. If either of these issues are found for the plaintiff, he will be entitled to recover."

To which the counsel for the defendants did then and there in due form of law except.

145 3. "These questions are mostly questions of fact, to be determined by you under the evidence; that is to say, if the facts are made out by the proof, to your satisfaction, that the bank drew this draft upon the faith and consideration of an agreement between the plaintiff and Charles H. Hall, that the draft of Charles H. Hall of the same date, and the defendants, Sherman Hall & Pope, should be accepted by said defendants, and security given for the payment thereof, and for no other consideration, and that the said conditions have not been fulfilled; that is, if the draft on the defendants has not been accepted and secured nor paid, and that the said defendants had notice at the time they received said draft from the said Charles H. Hall of the agreement and consideration on which the same was issued, then you will be justified in finding that the issue of failure of consideration has been made out by the proofs."

To which the counsel for the defendants did then and there except in due form of law.

4. "So as to the other issue, that the said draft was obtained from the said bank by the fraudulent acts of the said Charles H. Hall,
146 and that said defendants had knowledge of the said fraud at the time the draft came into their hands; that is, if you shall find from the evidence in the case that there was an understanding or collusion between Charles H. Hall and the defendants that Charles H. Hall should obtain said draft from the bank upon the faith and representation that the five thousand dollar draft of said Charles H. Hall on the defendants of the same date would be duly accepted, and collaterals put up to secure its payment, and that at the same time it was well understood between said Charles H. Hall and the defendants that said five thousand dollars would not be accepted nor securities put up, then you will be justified in finding that issue for the plaintiff."

To which the counsel for the defendants did then and there in due form of law except.

5. "I will here say to you, what you have frequently heard during the progress of the trial, that the plaintiff has the burden of proof on both these issues, and is bound to make out his allegations of fraud and failure of consideration by a fair preponderance of proof; and unless the proof establishes one or both of these issues in favor of the plaintiff,
147 your verdict will be for defendants. The draft in question appears fair & valid upon its face, and the labor to establish its invalidity upon one or the other of these issues is with the plaintiff.

6. "'Fraud is not to be presumed; it must be proven,' is a well-accepted maxim of the law; but this does not mean that fraud must be proven by direct and positive testimony. When men collude together to circumvent and defraud another, they generally take the precaution to conceal or obscure their intentions, frequently by a show of fair dealing and apparent uprightness. Their actions and the result of their actions in such cases are much more significant than what they say. What they do is altogether a far better index of their intentions than what they profess. Circumstances, as a general rule, are the only evidence by which fraud is established; and therefore while a jury should not be swift to assume fraud as proven by a single suspicious circumstance, yet, when a series of coherent circumstances all combine

to lead the mind to the same natural or legitimate conclusion that fraud has been perpetrated or intended, then the jury is not only justified in finding the allegation of fraud proven, but it is their duty to do so."

148 To which the counsel for the defendants did then and there in due form of law except.

7. "You are the judges of the weight to be given to the testimony in this case. The evidence is complicated and contradictory in many important particulars, and where there is contradiction or conflict, it is for you to say which is the most worthy of belief. In doing this you should carefully consider the motives and the interest of the witnesses whose testimony is at variance, their opportunities for having correct knowledge and information and recollection of the facts whereof they testify, the probability of mistake on the part of the one or the other, and the causes which might induce either to testify falsely. All these are matters for your consideration in passing upon this contradictory testimony. It is not only desirable that jurors should reconcile evidence without assuming perjury against any witness, but it is their duty to do so if possible. But where it is impossible to reconcile the evidence, then you must say which is to be believed. It is not necessary that you should attempt to reconcile all the collateral or incidental matters which have been testified to in the case, and which may be contradictory, if you

149 find running through the proof introduced on the trial a line of well-established circumstances, all of which naturally tend to prove a given allegation material to the issue, and which are not necessarily contradicted by the collateral facts and circumstances."

To which the counsel for the defendants did then and there except in due form of law.

8. "I have already told you that, if you find from the evidence that the draft in question was obtained by Charles H. Hall from the bank upon the faith that his five thousand draft of the same date on the defendants was to be accepted by the defendants and secured by collaterals, and that the defendants knew of such arrangement between Charles H. Hall and the bank at the time the draft came into their hands, and that such draft has not been so accepted or paid, then you should find the issue of failure of consideration for the plaintiff. The chief evidence, if my memory serves me right, and of this you are the judges, on this point is the evidence of the contents of a letter from Charles H. Hall to the defendants, enclosing said draft, bearing date the six-

150 teenth day of March, 1869. There is some conflict of evidence as to the exact wording of that letter, but all agree, I think, that the letter did in plain terms notify the defendants that he, Charles H. Hall, had that day drawn a draft for five thousand dollars on them, and that they were expected to accept the same and put up collaterals."

To which the counsel for the defendants did then & there in due form of law except.

9. "As to how far the allusions, in this letter, to this draft gave the defendants knowledge of the course of dealing between Charles H. Hall and the bank, tend to show that the draft then enclosed was part of the proceeds of the five thousand dollar draft drawn on them, is for you to determine. It is also proper that you consider in this connection that, the day before this draft was made by Charles H. Hall on the defendants, said Charles H. Hall had, in the office of the defendants in Chicago, made a sale of all of his grain in store in Cedar Rapids to McAffee, and that there would seem to be no resources belonging to the said Charles H. Hall with which to indemnify the defendants for this acceptance which he had made on them. You are to pass upon the pregnancy of all the

facts and circumstances bearing upon the manner in which Charles
151 H. Hall dealt with the bank and also with the defendants, and decide from all the evidence on the point whether Sherman Hall and Pope did know or had sufficient notice and information on the subject to be equivalent to actual knowledge, at the time this bank-draft came into their hands and was placed to Charles H. Hall's credit, that this draft was made by the bank upon the agreement and consideration that the defendants were to accept and secure said draft of five thousand dollars; and I believe there is no pretence that it has ever been so accepted or paid."

To which the counsel for the defendants did then and there in due form of law except.

10 "In examining into the question whether the allegations of fraud have been made out by the proofs, you will carefully consider the relations existing between Charles H. Hall and the defendants; the fact that he is a brother of one of the defendants; that he was largely indebted, not only to the present defendants but also upon an old account in favor of the old firm of Sherman, Hall & Pope; and you have the right to consider, not as conclusive but as a simple circumstance in the case, from your knowledge of human nature, whether he would not prefer that the losses of his business, if any, should fall rather upon the bank than
152 upon his brother or his firm. You should also weigh well and carefully consider how far the transaction between Charles H. Hall and the defendants and McAffee, here in Chicago, in the preparation of the bill of sale to McAffee of all his, Charles H. Hall's, grain, with the guaranty by the defendants of the amount and value of that grain, (and as the guaranty is testified to by Charles H. Hall and not contradicted by any other witness, I assume that you will consider it proven, although that is for you to pass upon,) and the manner in which said Charles H. Hall and McAffee acted with the bank after this transaction, by concealing the same from the plaintiff, or at least withholding information thereof from him on the subject at the time this draft in question was obtained, although it would seem to have been information to which the bank or its officers were entitled, as it related particularly to the question of Charles H. Hall's ability to meet the draft he was then drawing—I say you are to say how far these circumstances prove or tend to prove the allegations of fraud made by the plaintiff, and with which they claim to defeat the bill in question."

To which the counsel for the defendants did then and there in due form of law except.

11. "So with the attempt on the part of Charles H. Hall to
153 sell the Omaha grain; his leaving Chicago suddenly and secretly, so far as Mr. Weare was concerned, and his leaving Cedar Rapids on a freight-train at night, when it did not seem to have accelerated his arrival at his place of destination; his sale of grain which he says in his testimony was worth from thirty-five hundred to four thousand dollars for fifteen hundred dollars on a time contract; it is for you to say, I say, whether there is any testimony to show or tend to show that these defendants knew anything of this effort of Charles H. Hall, and whether it was part of a conspiracy and collusion between Charles H. Hall and the defendants, by which all Charles H. Hall's property was to be directly or indirectly transferred to the defendants to defraud the bank."

To which the counsel for the defendants did then and there in due form of law except.

12. "If all these circumstances, with others which I need not now particularize, when taken together, satisfy you that there was an inten-

tion to defraud the bank, and that the drawing of the five thousand dollar draft by Charles H. Hall and obtaining the forty-five hundred dollar draft was part of a scheme for defrauding the bank, then you will be authorized to find the issue of fraud for the plaintiff."

154 To which the counsel for the defendant' did then and there in due form of law except.

13. "Much stress is laid by defendants' counsel upon the date of the protest of certain drafts. I think there is no dispute as to the fact that these drafts were not formally protested for new acceptance until the eighteenth of March. But it is contended by the plaintiff that they were in fact presented for acceptance and acceptance refused on the sixteenth. I simply deem it my duty to say to you that the date of the protest is not of itself conclusive evidence that the demand for acceptances had not been made until that day. It may have been presented and acceptance refused at an earlier day, and the protest have been delayed. The evidence as to whether the drafts of the eleventh and twelfth of March were actually presented for acceptance and acceptance refused on the sixteenth or eighteenth of March, is a disputed point, which it is for you to pass upon and not for the court. All I intend to say is, that the mere date of the certificate and notice of protest is not conclusive evidence that the draft had not been refused acceptance before that time."

To which the counsel for the defendants did then and there in due form of law except.

155 14. "To recapitulate, then, the real questions at issue are not whether the consideration of this draft has failed as against Charles H. Hall, or whether Charles H. Hall was guilty of fraud in obtaining it, but whether the defendants at the time they took the draft from Charles H. Hall knew the facts out of which the draft originated to such an extent as to vitiate it in their hands; were they parties to Charles H. Hall's fraud, or did they know of his agreement that they should accept and secure his draft, and that the draft in question was part of the proceeds of his draft; or had they such knowledge of the circumstances out of which the draft originated that they must be reasonably supposed to have understood the whole of the matter? If this knowledge is not brought home to them, even if the fraud or failure of consideration, so far as Charles H. Hall is concerned, is fully proven, yet the plaintiff has not made out a case. While on the contrary, if the proof or a preponderance of the proof satisfies you that the defendants did know that the consideration of the contract in question was an agreement that the defendants should accept and secure and pay the five thousand dollar draft of Charles H. Hall, and that the defendants have refused to accept, secure, or pay, then the plaintiff will be
156 entitled to a verdict at your hands on the issue of failure of consideration."

To which the counsel for the defendants did then and there in due form of law except.

15. "And if you find from the evidence that this draft was obtained by Charles H. Hall from the plaintiff by false and fraudulent representations that certain other drafts had been accepted by defendants and secured by collaterals, and also, after the amount of grain he, the said Charles H. Hall, then had in store in Cedar Rapids had been sold and disposed of by him, and that the said defendants knew at the time they received said draft that the said draft had been so fraudulently obtained, or if you shall believe from the evidence that said draft was thus fraudulently obtained by Charles H. Hall from the plaintiff in pursuance of a

collusive and fraudulent conspiracy between the defendants and Charles H. Hall, with the express or implied understanding that the said five thousand dollar draft was not to be accepted, secured, nor paid, or as a part of the conspiracy between said Charles H. Hall and defendants, by which all the available property of said Charles H. Hall was to be transferred, directly or indirectly, to the defendants for the pur-
157 pose of defrauding the plaintiff and his bank, then you will be authorized in finding the issues of fraud for the plaintiff."

To which the counsel for the defendants did then and there in due form of law except.

16. "You may find one or both these issues for the plaintiff, if you shall consider the proof sufficient; but either will be sufficient to entitle the plaintiff to a verdict on the drafts declared on."

To which the counsel for the defendants did then and there in due form of law except.

17. "Or if you find the evidence does not sustain the plaintiff on either of these issues, then the defendants will be entitled to a verdict.

18. "The form of your verdict will be: We, the jury, find the issues, as the case may be, for the plaintiff, and assess the damages at the amount of the drafts, and interest at six per cent."

To which the counsel for the defendants did then & there in due form of law except.

19. "But if you find the issues for the defendants, you will also assess damages on their draft at the rate of five per cent., in addition to finding the issues for the defendants."

And thereupon the said action was submitted to the said jury
158 by the judge of said court, and they afterwards returned into the said court with their verdict, whereby they found the issues for the said plaintiff, and assessed his damages at the sum of $5,553.75.

And thereupon the defendants, by their counsel, after the said verdict and before the judgment thereon, moved the said court to arrest the judgment on the verdict, upon the pleas of the said defendant, for want of a replication traversing an allegation therein of a promise to pay the said draft so drawn by the said First National Bank of Cedar Rapids to said Charles H. Hall for forty-five hundred dollars, and the interest thereon and cost of protesting the same, and five per cent. damages thereon; which motion the said court overruled, and the counsel for the defendants did then and there in due form of law except.

And the said defendants thereupon moved the said court for a new trial of the issues in said cause, upon the evidence and upon the exceptions aforesaid; which motion the said court overruled, and ordered judgment on the said verdict, against the said defendants, and in favor of the said plaintiff; to which the said defendant did then and there in due form of law except.

159 And because none of the aforesaid exceptions appear upon the record of the said recovery, the judge of said court who tried the said action hath hereto set his hand and seal, and ordered the same to be made a part of the said record.

H. W. BLODGETT. [SEAL.]

It is my opinion that the foregoing bill of exceptions is too long, and contains much matter entirely unnecessary to a full comprehension by the Supreme Court of the errors to be reviewed; but the attorneys for plff. in error insist so strenuously that all the foregoing mu t be inc uded in the bill of exceptions, that I have signed the same under protest as to its prolixity.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed June 10th, 1873. Wm. H. Bradley, clerk.

160 And afterwards, to wit, on the 29th day of July, A. D. 1873, the following bond in appeal was filed in the office of the clerk of the circuit court of the United States for said northern district of Illinois, to wit:

Circuit court of the United States, northern district of Illinois.

JOHN WEARE
v.
J. SHERMAN HALL AND WILLIAM J. POPE.

Know all men by these presents that we, J. Sherman Hall, Wm. J. Pope, Francis A. Riddle, and William H. Little, of Chicago, in said district, are held and firmly bound unto John Weare, of Cedar Rapids, in the State of Iowa, in the penal sum of seven thousand five hundred dollars, to be paid to the said John Weare, his executors, administrators or assigns; to which payment well and truly to be made *be* bind ourselves & each of us jointly and severally & our & each of our
161 heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this 28th day of July, A. D. 1873.

Whereas the above-named J. Sherman Hall & Wm. J. Pope have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the said circuit court:

Now, therefore, the condition of this obligation is such that if the above-named J. Sherman Hall & Wm. J. Pope shall prosecute their said writ of error to effect, and answer all costs & damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force & virtue.

J. SHERMAN HALL. [SEAL.]
WM. J. POPE. [SEAL.]
W. H. LITTLE. [SEAL.]
FRANCIS A. RIDDLE. [SEAL.]

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 29, 1873. Wm. H. Bradley, clerk.

162 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a true copy of the record and proceedings had and entered of record in the cause wherein John Weare is the plaintiff, J. Sherman Hall and William J. Pope are the defendants, as the same appears from the records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 2d day of October, A. D. 1873, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

163 United States of America to John Weare, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1873, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein J. Sherman Hall and William J. Pope are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should

not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable H. W. Blodgett, judge of the dist. court, northern dist. of Ills., this 9th day of October, 1873.

H. W. BLODGETT, *Judge.*

164 (Indorsed:) We hereby accept service on the defendant in error and agree to enter his appearance in the Supreme Court of the United States.

October 9, 1873.

DENT & BLOCK,
Attys. for Dft. in Error, John Weare.

165 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said court before you, between John Weare, plaintiff, and J. Sherman Hall and William J. Pope, defendants, a manifest error hath happened, to the great damage of the said J. Sherman Hall and William J. Pope, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you
166 have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Nathan Clifford, Acting Chief-Justice of the Supreme Court of the United States, this 10th day of June, A. D. 1873, and of our Independence the 97th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

The execution of this writ appears by the annexed transcript.

(Indorsed:) Circuit court U. S., northern dist. of Illinois. John Weare vs. J. Sherman Hall et al. Writ of error.

167 *Assign't of errors.*

Supreme Court of the United States, of October term, A. D. 1873.

J. SHERMAN HALL AND WM. J. POPE, PLFFS. in error,
vs.
JOHN WEARE, DEFT. IN ERROR.

Afterwards, to wit, on the 2nd Monday of October, A. D. 1873, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said plaintiffs in error, by E. A. Storrs and J. A. Sleeper, their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

I. For that the said circuit court admitted improper evidence on the trial of the said action to be given to the jury, against the objection of the defendants therein.

II. For that the said circuit court, on the trial of the said action, excluded from the jury proper and competent evidence offered by the defendants therein.

168 III. For that the defendants in the said action upon the pleadings therein had the affirmative of the issues, and were entitled the affirmative throughout, and to open and close the argument of the said cause to the jury; notwithstanding which, the said circuit court, after the evidence was closed, permitted the said plaintiff therein to open and close said argument, against the objection of the defendants in said action.

IV. For that the said circuit court erred in its instructions to the jury, in that, that under the pleadings and evidence in the case, the said court submitted to the jury the question whether the considerations of the draft or bill of exchange pleaded in offset by the defendants in said action had failed; and in that the said court instructed the jury that they would be justified in finding that the consideration for said draft or bill of exchange had failed if they should find the facts in
169 that behalf stated in the charge; and in that, that the said circuit court, under the evidence given on the trial of said action, submitted to the jury the question of knowledge by said defendants of the fraudulent acts or representations of Charles H. Hall in obtaining said draft or bill of, even though they should find that said Charles H. Hall was guilty of making any fraudulent representations or doing any fraudulent acts; and in that, that the said court charged and instructed the jury that if they found either of the issues enumerated in the charge, that the plaintiff would be entitled to recover the amount of the accepted drafts declared on in his declaration.

V. For that the said circuit court, in its instructions to the jury, charged and instructed them as to the facts in the case contrary to the statute in such case made and provided; and for that, also, the said court in its charge instructed as to the effect they might give to
170 certain facts assumed by the court to have been proved by the evidence; and for that, also, the said court in its charge instructed the jury that they might find certain matters of fact as to which there was no evidence given in the case, and submitted to them questions of fact as to which there was no evidence before the jury to warrant or justify the court in submitting such questions, or the jury in finding the facts to exist.

VI. For that said circuit court erred in giving its charge to the jury upon the law and the facts.

VII. For that the said verdict of the jury is contrary to the law and the evidence, and should have been given for the defendants instead of for the plaintiff below.

VIII. For that the said court erred in refusing to set aside the
171 verdict in this action and to grant the defendants a new trial therein upon their motion.

IX. For that said court erred in overruling the motion of the defendants below for an arrest of judgment upon the verdict of the jury.

Wherefore the said plaintiffs in error pray that for the errors aforesaid, and for other errors appearing upon the record aforesaid, the said judgment may by this court be wholly reversed, set aside, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the premises, &c.

E. A. STORRS &
J. A. SLEEPER,
Attys. for Plffs. in Error.

(Indorsement on cover:) No. 202. J. Sherman Hall and William J. Pope, plffs. in error, vs John Weare. N. Illinois, C. C. U. S. Filed 23 October, 1873.

C